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CONTINUING THE CONSTITUTIONAL DIALOGUE: A DISCUSSION OF JUSTICE STEVENS'S ESTABLISHMENT CLAUSE AND FREE EXERCISE JURISPRUDENCE

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ABSTRACT—This Article examines Justice John Paul Stevens's religion clause jurisprudence from the perspective of a continuing dialogue about the meaning of the Free Exercise Clause and the Establishment Clause. The term continuing dialogue suggests that even for as formidable and long-tenured a jurist as Justice Stevens, important questions remain open and unresolved. In discussing these unanswered questions, the article explores potential dissonance between Justice Stevens's contrasting interpretations of the Free Exercise Clause and the Establishment Clause. For example, Justice Stevens's concern for the status and sensibilities of religious minorities, expressed repeatedly in his Establishment Clause opinions reviewing state-sponsored religious displays, plays a far less obvious and focused role in his free exercise jurisprudence. Yet surely minority faiths may suffer a similar sense of alienation when government denies them exemptions from general laws that burden their religious practices, but not those of the majority. Similarly, the opinions Justice Stevens joined limiting free exercise claims reject a federal judicial role that requires subjective, value-based balancing. Justice Stevens's view that the Establishment Clause requires the evaluation of legislative accommodations to determine whether they unfairly favor certain faiths or extend too far and impose unacceptable burdens on third parties or the public, however, would seem to involve judges in a comparably subjective and value-laden inquiry.

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INTRODUCTION

Constitutional law over time is neither fixed by precedent nor controlled by history. It is the product of a continuing constitutional dialogue within the judiciary, and, more importantly, between the courts, the political branches of government, and the American people. There is no doubt that during his thirty-five-year tenure as a Justice on the United States Supreme Court, Justice Stevens has played a significant and valued role in that ongoing dialogue in many seriously contested areas of constitutional law. Few disputed areas, however, have involved the intensity of controversy or the fluidity of doctrine as the interpretation of the Free Exercise and Establishment Clauses of the First Amendment.

Analyzing Justice Stevens's religion clause jurisprudence is a difficult undertaking not only because of the heated and enduring debate about the meaning of these constitutional provisions, but also because the complexity of church–state issues and the numerous values subsumed by them makes it hard to develop coherent and effective doctrine to resolve these disputes. Moreover, the opinions of any Supreme Court Justice, even one who has been on the Court as long as Justice Stevens, provide only an incomplete picture of the Justice's perspective on multifaceted constitutional questions. Supreme Court opinions focus on specific cases and provide only limited opportunities for direct exchanges between Justices or follow-up inquiries. The give and take of protracted argument is precluded by the form and function of the proceedings. There can be only so many "but what about this argument" inquiries directed back and forth among the written opinions of the majority, concurring, and dissenting Justices.

The goal of this Article is to attempt to continue the dialogue beyond the scope of Justice Stevens's opinions and to extend our understanding of his religion clause jurisprudence. This Article begins by identifying the principles and values underlying Justice Stevens's perspective that we can ascertain with some degree of confidence. That foundation will be followed by critical inquiries challenging the connection between these values and principles and various holdings and doctrine Justice Stevens supported in his opinions.

So far the analysis is on fairly solid ground. At this point, however, the discussion will become unavoidably tentative and speculative, at least to some extent. There are serious rejoinders to these inquiries. The opinions Justice Stevens wrote or joined may give some basis for describing the responses he would offer, but it is impossible to determine how he would reply with any degree of certainty. Moreover, as the discussion progresses and responses to responses are considered, the relationship between what we know about Justice Stevens's understanding of the religion clauses and the arguments presented in this Article become increasingly attenuated. Thus, what this Article presents is an extrapolation of the debate surrounding Justice Stevens's religion clause jurisprudence that identifies areas of inquiry to pursue as the constitutional dialogue continues.

Parts I, II, and III of this Article describe the substance of Justice Stevens's religion clause jurisprudence as it is expounded in the many opinions he authored or joined. Part I examines Justice Stevens's support for the rigorous enforcement of Establishment Clause principles limiting the government's ability to promote religion through financial subsidies and state-sponsored prayers or religious displays. Part II analyzes Justice Stevens's less interventionist approach to free exercise claims and his reluctance to protect free exercise rights against neutral laws of general applicability that substantially burden religious practice. Part III describes Justice Stevens's position that the Establishment Clause requires judicial vigilance in reviewing discretionary religious exemptions provided by the political branches of government in order to determine whether such accommodations go too far in imposing costs on third parties or unfairly favor certain faiths over others.

The discussion in all three Parts attempts to identify the values that distinguish and explain Justice Stevens's interpretation of the religion clauses. This analysis suggests that religious equality was Justice Stevens's dominant, but not his exclusive, concern. Justice Stevens rejected state-sponsored prayer and religious displays because they offended and alienated religious minorities and non-religious Americans. He challenged both financial and expressive promotion of religion because such state support increased religious fragmentation and divisions in our society to the disadvantage of smaller faiths. He opposed constitutionally mandated religious exemptions because they risked the favoring of more familiar faiths and the marginalization of less conventional religions. For similar

reasons, he argued that discretionary accommodations by the political branches of government must be carefully evaluated to ensure that they do not unfairly provide preferential protection to certain faiths while unacceptably burdening people of other faiths or no faith with their cost.

In addition, Justice Stevens doubted the ability of the courts to competently and impartially balance free exercise rights and competing state interests. Such ad hoc and subjective balancing of the religious liberty of private individuals and groups against the public good exceeded the ability of judges and inappropriately intruded into legislative prerogatives. It also risked decisions that favored more common faiths while slighting the interests of less familiar religions.

Part IV of this Article identifies unanswered questions arising out of Justice Stevens's opinions and constructs a back and forth dialogue to discuss them. Why, we may ask, does Justice Stevens's concern for the sensibilities of religious minorities and the dangers of religious divisiveness justify the review and invalidation of state-sponsored religious displays and prayers that endorse majoritarian beliefs but not laws that unnecessarily burden the practices of minority faiths? Isn't it equally likely that neutral laws of general applicability that avoid interfering with the religious practices of larger faiths but substantially burden the practices of smaller religions will offend and alienate minorities whose right to practice their faith is ignored? Aren't political debates about accommodating or refusing to accommodate religious practices as divisive as debates about the content of religious displays?

The possible responses to these questions are varied. Even if the denial of free exercise accommodations causes offense and increases religious divisions in our society, there may be other reasons why courts review the constitutionality of religious displays under the Establishment Clause yet assign the evaluation of free exercise claims for accommodation to the political branches of government. Free exercise disputes may be harder to avoid than religious display cases. More importantly, their resolution may be more unpredictable and subjective than challenges to state-sponsored religious displays and public prayers.

These explanations, however, are also subject to challenge. It is by no means clear that determining whether a state-sponsored religious message constitutes a prohibited endorsement of religion is less subjective and more predictable an undertaking than balancing free exercise claims against the state's interests in denying requested accommodations. Moreover, some form of balancing of religious exercise and competing state interests may be an unavoidable cost under Justice Stevens's understanding of the religion clauses—even if free exercise accommodation decisions are initially assigned to the political branches of government. Justice Stevens believes the federal courts have significant oversight responsibilities under the Establishment Clause to ensure that discretionary political accommodations do not unequally favor certain faiths over others or go too far in burdening

nonbeneficiaries with their cost. It is not at all clear that courts can fulfill those responsibilities without engaging in the same kind of a subjective and value-laden analysis that is intrinsic to the adjudication of free exercise claims.

Part IV does not attempt to definitively answer these questions. Its goal is to present a constitutional dialogue addressing the unresolved issues inspired by Justice Stevens's religion clause jurisprudence.

I. RIGOROUS ENFORCEMENT OF ESTABLISHMENT CLAUSE CONSTRAINTS ON GOVERNMENT PROMOTION OF RELIGION

There is no doubt that Justice Stevens viewed the Establishment Clause as a formidable constitutional barrier to the government's promotion of religion. Justice Stevens's commitment to the "no aid" principle restricting government subsidies to religious institutions and activities was broad-based and unwavering. More than any of his brethren, he insisted that laws must have a clear or primary secular purpose. He was equally adamant in arguing that in most cases, state-sponsored prayer and religious displays impermissibly endorsed certain religious beliefs and communities while disfavoring others. The values underlying these interpretations of the Establishment Clause reflected both religious liberty and religious equality interests, but Justice Stevens clearly emphasized equality more than liberty as the controlling concern of his jurisprudence.

A. No Aid to Religion Means NO Aid to Religion

Justice Stevens supported the rigorous enforcement of Establishment Clause principles restricting government's ability to subsidize religious institutions and activities. In cases involving financial aid to religion, particularly to religious schools, Justice Stevens insisted that the wall separating church and state should be high, consistently enforced, and virtually impregnable.[1] It did not matter whether aid was direct or whether it depended on the independent choice of private individuals—government funds could not be used to subsidize religious education.[2] Aid to religious colleges was suspect as well as aid to elementary or secondary schools.[3] Aid

[1] *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Wolman v. Walter, 433 U.S. 229, 265–66 (1977) (Stevens, J., concurring in part and dissenting in part), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting). The only case in which Justice Stevens voted to uphold state aid to religion was *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 482 (1986), which upheld a state program providing financial assistance to a blind person who wanted to study at a Christian college to pursue a career as a pastor, missionary, or youth director.

[2] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 685 (2002) (Stevens, J., dissenting); Mueller v. Allen, 463 U.S. 388, 404 (1983) (Marshall, J., joined by Brennan, Blackmun & Stevens, JJ., dissenting).

[3] *See Mueller*, 463 U.S. at 404–05 (Marshall, J., joined by Brennan, Blackmun & Stevens, JJ., dissenting); *Roemer*, 426 U.S. at 775 (Stevens, J., dissenting).

that served important secular goals, such as fire prevention, could not be provided to religious institutions if it assisted their religious mission.[4] Justice Stevens sharply criticized the Court's ad hoc and incoherent willingness to uphold some aid programs while striking down others instead of adhering to the inflexible "no aid" principle the Constitution required.[5]

The justifications for Justice Stevens's commitment to an insurmountable barrier to government aid to religion are less clearly stated than the consistent "no aid" position he endorsed. If we look at the opinions Justice Stevens authored, we note two particular rationales for prohibiting aid to religion. First, state aid to religious institutions made them dependent on government support and vulnerable to state control. Thus, in *Roemer v. Board of Public Works*, Justice Stevens emphasized "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."[6] In *Wolman v. Walter*, he pointed to several aid provisions which illustrated this concern. For example, in order "[t]o qualify for aid, sectarian schools must relinquish their religious exclusivity" in admitting students or hiring teachers.[7] In addition, Justice Stevens explained, "sectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State."[8]

Second, Justice Stevens believed that the use of state funds to subsidize religion would contribute to religious divisions in our society as different religious factions sought to maximize their access to government support. In *Zelman v. Simmons-Harris*, Stevens referred to religious strife in Europe that led to early immigration to America and to religious conflicts in various parts of the world today.[9] "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[10]

Finally, if we expand our inquiry to include opinions that Justice Stevens joined, we see that Justice Stevens identified a third justification for prohibiting state aid to religion: protecting the taxpayer's liberty interest in not subsidizing the promulgation of religion, particularly faiths other than his own. "[C]ompelling an individual to support religion violates the fundamental principle of freedom of conscience. Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction

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[4] *See Regan*, 444 U.S. at 671 (Stevens, J., dissenting).

[5] *Wolman*, 433 U.S. at 265 (Stevens, J., concurring in part and dissenting in part).

[6] 426 U.S. at 775 (Stevens, J., dissenting).

[7] *Wolman*, 433 U.S. at 266 n.7 (Stevens, J., concurring in part and dissenting in part).

[8] *Id.*

[9] 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

[10] *Id.*

requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."[11]

These justifications for the demanding "no aid" principle that Justice Stevens endorsed are seldom emphasized when the Justice's Establishment Clause jurisprudence is described and evaluated.[12] As will be evident shortly, many of Justice Stevens's Establishment Clause opinions focus on religious equality as a critical constitutional value and goal.[13] The foundation for Justice Stevens's position prohibiting state aid to religion, however, is religious liberty—the liberty of the taxpayer who challenges the government's use of her tax dollars to subsidize other faiths, and the liberty of religious institutions and communities to be free from the dependency and control that inevitably follows the acceptance of government support.[14]

B. The Secular Purpose Requirement

Justice Stevens interpreted the Establishment Clause to require the invalidation of laws that lacked a "clearly" or "primary" secular purpose.[15] A law's purpose under his analysis did not require an inquiry into the personal religious beliefs of the legislator. Thus, the fact that a legislator believed that free speech is a good thing for religious reasons would not require the invalidation of statutes facilitating speech under the Establishment Clause.[16] The utility and purpose of statutes facilitating speech can be explained without acknowledging the value or truth of religious beliefs. Also, the fact that a law resulted in some incidental secular consequences did not establish the law's secular purpose.[17] A law requiring school children to recite Protestant prayers at public school would not be understood to serve a secular purpose because of the perceived promotion of moral values that result from doing so.[18] Such a law presupposed the

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[11] Mitchell v. Helms, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) (footnote omitted); *accord Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (arguing that "no one 'shall be compelled to . . . support any religious worship, place, or ministry whatsoever'" (alteration in original) (quoting THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779))); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 868 (1995) (Souter, J., dissenting) ("Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause . . . ."); Eduardo Moisés Peñalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 FORDHAM L. REV. 2241, 2243 (2006).

[12] *See, e.g.*, Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 FORDHAM L. REV. 2177 (2006) (discussing the equality-based principles of Justice Stevens's and Justice O'Connor's religion clause jurisprudence).

[13] *See infra* notes 28–64 and accompanying text.

[14] *See supra* notes 6–11 and accompanying text.

[15] *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 284–86 nn.19 & 21 (1990) (Stevens, J., dissenting).

[16] *See id.* at 285 n.21.

[17] *See id.* at 286 n.21.

[18] *See id.*

value of religious observance or the truth of religious belief as the basis for achieving such benefits. To Justice Stevens, a challenged law serves a religious purpose if it "reflects a judgment that it would be desirable for people to be religious or to adhere to a particular religion."[19]

The methodology a court may employ to determine whether or not a law has a secular purpose raises numerous issues,[20] most of which are beyond the scope of this Article. A less obvious, but equally important, question might focus on the nature of the interest that is burdened when government adopts laws that serve religious purposes. Because Justice Stevens takes a particularly aggressive position in evaluating laws alleged to lack a secular purpose, this issue is more difficult to answer for Justice Stevens's jurisprudence than it is for other Justices who interpret this Establishment Clause requirement more narrowly.

For example, Justice Stevens was the lone member of the Court who argued that some laws restricting a woman's ability to choose to have an abortion violated the Establishment Clause because the laws lacked a secular purpose. In essence, Justice Stevens argued that no secular arguments exist supporting a state's position that protecting fetal life is equally compelling from conception to birth,[21] or that there is a reason to differentiate between contraceptives that prevent fertilization and devices that prevent the implantation of the fertilized egg in the uterine wall.[22] Given the frequently asserted theological arguments supporting these contentions, Justice Stevens concluded that laws grounded on either assumption further religious rather than secular purposes.[23]

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[19] *Id.*

[20] *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 861–64 (2005); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 98–102 (2002) (discussing four objections to the secular purpose requirement).

[21] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[22] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 563–66 (1989) (Stevens, J., concurring in part and dissenting in part).

[23] *Id.* at 566–69.

Putting aside the merits of Justice Stevens's analysis,[24] we can ask what constitutionally cognizable harm is done if his analysis is correct and if certain antiabortion laws serve a religious purpose. One answer focuses on religious liberty concerns. The state cannot require individuals to conform their decisions about how they want to live their lives to the tenets of a particular religious faith. This aspect of a secular purpose analysis resonates with the Court's language in *Epperson v. Arkansas* (affirmed in *Edwards v. Agullard*[25]) that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[26] In the context of laws prohibiting abortion, one might paraphrase this quote to state that the First Amendment does not permit the State to require that a woman's decision whether or not to bear a child must be tailored to the principles or prohibitions of any religious sect or dogma.[27]

While the secular purpose requirement may protect individual liberty in some cases, in many other circumstances it primarily protects religious equality. Indeed, equality concerns appear to be the controlling interest in several secular purpose opinions that Justice Stevens has written or joined. In *Webster v. Reproductive Health Services*, for example, Justice Stevens argued that the preamble to a Missouri statute defining conception violated the Establishment Clause because it lacked a secular purpose even if the statutory language "merely makes legislative findings without operative effect."[28] A law without operative effect cannot abridge liberty, but it can offend religious equality principles. The language in the Missouri statute was unconstitutional because it was "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths,"[29] and injected

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[24] There is significant philosophical debate about the morality of abortion, which extends beyond exclusively theological arguments. *See generally* JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES (reprt. 1990) (discussing moral and philosophical problems around killing, including the issues of abortion, infanticide, war, and euthanasia); ROSALIND HURSTHOUSE, BEGINNING LIVES (reprt. 1988) (discussing and seeking to refute several of the prevailing moral philosophical positions in support of abortion); L.W. SUMNER, ABORTION AND MORAL THEORY (1981) (discarding extreme liberal and conservative views on abortion in favor a moderate approach and defending utilitarianism as a philosophical rationale for a moderate view); THE PROBLEM OF ABORTION (Susan Dwyer & Joel Feinberg eds., 1997) (collecting essays on both sides of the philosophical debate surrounding abortion); WHAT IS A PERSON? (Michael F. Goodman ed., 1988) (collecting essays on the philosophical underpinnings of personhood and their relationship to the abortion debate).

[25] 482 U.S. 578, 591 (1987).

[26] Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

[27] The secular purpose requirement also arguably protects a liberty interest in meaningful participation in the political development of law. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993).

[28] 492 U.S. at 571 (internal quotation marks omitted).

[29] *Id.* at 566.

the state legislature's "endorsement of a particular religious tradition" into the abortion debate.[30]

Similarly, Justice Stevens wrote the majority opinion in *Wallace v. Jaffree*, striking down an Alabama statute requiring elementary school children to observe a moment of silence for meditation or voluntary prayer on the grounds that the law lacked a secular purpose.[31] Because the compliance of children with this statute cannot be observed and policed—the teacher can determine if they are silent but not what they are thinking—it is difficult to argue that this law burdened religious liberty in any meaningful sense. The constitutional defect in the law is grounded in equality, not liberty, concerns. Thus, Justice Stevens explained that the statute served a religious purpose because it "was enacted to convey a message of state endorsement and promotion of prayer."[32] Rather than maintaining a posture of neutrality toward religion, the state's intention in adopting this statute was "to characterize prayer as a favored practice."[33]

Justice Stevens's long discussion of the secular purpose requirement in his dissent in *Board of Education v. Mergens*[34] is also based on equality principles. Justice Stevens argued that the congressional focus in enacting the Equal Access Act, which required local school districts to permit student religious groups to meet on secondary school premises, raised serious questions about the statute's secular purpose.[35] Ultimately, however, the equal treatment required by the law satisfied his concerns. The Establishment Clause does not prohibit Congress or local school districts from "bring[ing] organized religion into the schools so long as all groups, religious or not, are welcomed equally."[36]

Religious equality is also the cornerstone of the Court's inquiry into government purpose in religious display cases. Justice Souter's majority opinion in *McCreary County v. ACLU of Kentucky*, which Justice Stevens joined, emphasized the connection between the requirement that laws must have a secular purpose and the constitutional commitment to neutrality among faiths and between religion and irreligion.[37] Thus, Justice Souter explained that the secular purpose requirement "aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[38] The Ten

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[30] *Id.* at 571.

[31] 472 U.S. 38, 59–61 (1985).

[32] *Id.* at 59.

[33] *Id*. at 60.

[34] 496 U.S. 226, 285–88 (Stevens, J., dissenting).

[35] *See id.* at 287.

[36] *Id.* at 288.

[37] 545 U.S. 844, 859–60 (2005).

[38] *Id.* at 860 (alteration in original) (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987)) (internal quotation mark omitted).

Commandments display at issue failed this requirement because it expressed a clear preference for particular religious beliefs. To the majority, a reasonable observer viewing the display in context "could only think that the Counties meant to emphasize and celebrate the Commandments' religious message."[39]

Unlike his reasoning in state-aid-to-religion cases, Justice Stevens's discussion of the secular purpose requirement emphasized religious equality over religious liberty concerns. Laws that served religious purposes typically favored religious believers over nonbelievers or adherents of certain faiths over others. As the next section demonstrates, however, Justice Stevens's commitment to religious equality and his challenge to laws that marginalized and alienated religious minorities were most vigorously asserted in cases involving state-sponsored prayer or religious displays.

C. The Anti-Endorsement Presumption Against State-Sponsored Prayer and Religious Displays

Secular purpose analysis aside, Justice Stevens's commitment to religious equality is particularly evident in his opinions reviewing religious displays on public property or government-sponsored prayer. To Justice Stevens, government-sponsored religious displays or prayers necessarily expressed a message favoring some faith or faiths over others. Such state affirmation of certain religions and disrespect of others fragments citizens along religious lines and increases religious divisiveness in our society. For these reasons, Justice Stevens argued for a strong presumption against the display of religious symbols on public property or government-sponsored prayers at public events.

This position permeates Justice Stevens's opinions and those he joined. For example, in *Lynch v. Donnelly*, the case upholding a government-sponsored Christmas display including a nativity scene as well as less sectarian Christmas symbols, Justice Stevens joined Justice Brennan's and Justice Blackmun's dissenting opinions.[40] Justice Brennan argued that the nativity scene "serves to reinforce the sense that the city means to express solidarity with the Christian message of the crèche and to dismiss other faiths as unworthy of similar attention and support."[41] Justice Blackmun argued similarly against upholding the inclusion of the nativity scene because "non-Christians [would] feel alienated by its presence."[42]

Much more often, Justice Stevens spoke in his own voice. In *Marsh v. Chambers*, he dissented from the Court's decision upholding the

[39] *Id.* at 869.

[40] 465 U.S. 668, 670–72 (1984).

[41] *Id.* at 713 (Brennan, J., dissenting).

[42] *Id.* at 727 (Blackmun, J., dissenting).

appointment of a chaplain selected by a Legislative Council and paid with public funds to offer prayers at the beginning of each session of the Nebraska state legislature.[43] Commenting on the extended sixteen-year tenure of a Presbyterian minister as the legislature's chaplain, Justice Stevens explained that "the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment."[44] Justice Stevens chided the majority for its unwillingness "to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of . . . [his prayers] to the silent majority."[45]

In 1989 in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, Justice Stevens concurred in the Court's holding that a stand-alone crèche in a prominent location in the county courthouse violated the Establishment Clause.[46] He dissented, however, from the holding that a large, city-sponsored Chanukah menorah and Christmas tree outside a government office building did not violate Establishment Clause requirements.[47] To Justice Stevens, government sponsorship of religious displays was constitutionally problematic because of the government disposition it communicated. Thus, he wrote, "[t]reatment of a symbol of a particular tradition demonstrates one's attitude toward that tradition."[48] Such displays had "the purpose and effect of providing support for specific faiths"[49] and risked "offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful."[50]

Offense was not the only harm to be avoided. Government-sponsored religious displays were intrinsically divisive. If government can endorse favored religious beliefs, religious status becomes a political spoil to be fought over and captured by religious factions in our society. Thus, Justice Stevens emphasized in *Allegheny County* that "displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement."[51]

Eleven years later, Justice Stevens wrote the majority opinion in *Santa Fe Independent School District v. Doe*, striking down a school district

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[43] 463 U.S. 783, 822–24 (1983) (Stevens, J., dissenting).
[44] *Id.* at 823.
[45] *Id.* at 823–24.
[46] 492 U.S. 573, 654 (1989) (Stevens, J., concurring in part, dissenting in part).
[47] *Id.*
[48] *Id.* at 649.
[49] *Id.* at 650.
[50] *Id.* at 651.
[51] *Id.*

policy delegating to the student body the authority to decide through an election whether a prayer should be offered before high school football games and, if so, the student speaker who would deliver it.[52] The constitutional defects and impermissible consequences resulting from this policy were plain to Justice Stevens: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants 'that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community.'"[53] Moreover, the election procedure itself "encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause."[54]

Justice Stevens provided his most complete discussion of this issue in his dissenting opinion in *Van Orden v. Perry*, a case upholding state sponsorship of a Ten Commandments monument on the grounds of the Texas State Capitol.[55] Put simply, he explained, "the Establishment Clause demands . . . [that] government may not exercise a preference for one religious faith over another."[56] This constitutional mandate requires government to treat members of all faiths with equal respect. The state cannot provide "comfort, even inspiration, to many individuals who subscribe to particular faiths," while simultaneously offending nonmembers of those faiths who are treated as if their beliefs are of lesser worth.[57]

For Justice Stevens, this command is universal. Forcefully rejecting Justice Scalia's contention that the Constitution permits state preferences for monotheistic messages, Justice Stevens insisted that the Establishment Clause applies with equal force to all religions.[58] Texas cannot constitutionally endorse the scriptural message of the Ten Commandments and its proclamation of the divinity of the "Judeo-Christian God" because doing so would exclude "polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism."[59] Equal status and respect was also guaranteed to those who reject religious beliefs. To Justice Stevens, "the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith."[60]

To Justice Stevens, religious majorities deserved no special recognition. The people of the United States are diverse in their religious

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[52] 530 U.S. 290, 301 (2000).

[53] *Id.* at 309–10 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

[54] *Id.* at 311.

[55] 545 U.S. 677, 691–92 (2005).

[56] *Id.* at 709 (Stevens, J., dissenting).

[57] *Id.* at 708.

[58] *See id.* at 728–29.

[59] *Id.* at 719.

[60] *Id.* at 711.

and secular beliefs.[61] Accordingly, the state's "propagation of an unmistakably Judeo-Christian message of piety would . . . make nonmonotheists and nonbelievers 'feel like [outsiders] in matters of faith, and [strangers] in the political community.'"[62] The Establishment Clause exists to prevent this kind of state-induced alienation and marginalization.

Most recently, in his dissent in *Salazar v. Buono*,[63] Justice Stevens summarized his position on government-sponsored religious displays and prayers succinctly. Justice Stevens wrote:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."[64]

As the preceding discussion demonstrates, Justice Stevens interpreted the Establishment Clause to impose serious constraints on government's ability to promote religion. His adherence to these principles, particularly his advocacy for rigorous enforcement of the secular purpose requirement and a presumption against state-sponsored prayer and religious displays, reflected Justice Stevens's commitment to protecting religious minorities and nonbelievers against unequal treatment and the disparagement of their status in the community. These concerns for minority sensibilities, however, did not extend to the rigorous review of free exercise claims against neutral laws of general applicability.

II. FREE EXERCISE EXEMPTIONS: EVALUATING LIBERTY CLAIMS THROUGH AN EQUALITY PRISM

Justice Stevens strongly supported judicial vigilance and intervention in support of Establishment Clause requirements. He was less supportive of judicial intervention to enforce free exercise rights. Indeed, because of this ostensible difference in constitutional commitment, Justice Stevens's free

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[61] *See id.* at 720; *see also* BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY: SUMMARY REPORT 5, 23 (2009), *available at* http://livinginliminality.files.wordpress.com/2009/03/aris_report_2008.pdf (presenting statistics showing an increase in the percentage of Americans who identify as members of a non-Christian religion or as having no religion at all in the last twenty years); PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (noting that the United States "is on the verge of becoming a minority Protestant country"). According to the Pew survey, there are over 140 religions in the United States, including divisions within religious sects.

[62] *Van Orden*, 545 U.S. at 720 (alterations in original) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting)).

[63] Salazar v. Buono, 130 S. Ct. 1803, 1828–42 (2010) (Stevens, J., dissenting) (evaluating the constitutionality of a state divestment of public land on which a cross is displayed).

[64] *Id.* at 1832 (Stevens, J., dissenting) (quoting County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989)) (internal quotation marks omitted).

exercise jurisprudence is sometimes described as entirely one-sided and negative in its approach to religious liberty.[65]

That normative generalization does not adequately describe the case law. In free exercise cases, Justice Stevens joined the majority opinion in supporting free exercise claims in *Thomas v. Review Board of the Indiana Employment Security Division*[66] and *Frazee v. Illinois Department of Employment Security*,[67] and he concurred in the judgment in *Hobbie v. Unemployment Appeals Commission*.[68] He joined the dissent in *O'Lone v. Estate of Shabazz* to argue for greater protection of the religious liberty of prisoners.[69] He was the only member of the Court who joined the entirety of Justice Kennedy's opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, including the section focusing on the invidious legislative intent of the Hialeah City Council.[70] On the other hand, he concurred with the majority of the Court in rejecting free exercise claims in *Lee v. Weisman*,[71] *Goldman v. Weinberger*,[72] and *Bowen v. Roy*,[73] and joined majority opinions rejecting free exercise claims in *Tony & Susan Alamo Foundation v. Secretary of Labor*,[74] *Hernandez v. Commissioner*,[75] *Jimmy Swaggart Ministries v. Board of Equalization*[76] and *Bob Jones University v. United States*.[77] Justice Stevens also wrote the majority opinion in *Employment Division, Department of Human Resources v. Smith* (*Smith I*)[78] and joined Justice Scalia's majority opinion in *Employment Division, Department of Human Resources v. Smith* (*Smith II*).[79]

This is not a record of unfailing rejection of free exercise exemptions. Still, far more often than not, Justice Stevens voted to deny free exercise

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[65] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting) (criticizing Justice Stevens's opinion as "bristl[ing] with hostility to all things religious in public life"); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1010 (1990) ("The apparent explanation for [Justice Stevens's] voting pattern is hostility to religion."); Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMMENT. 7, 17–18 (1997) (claiming that Justice Stevens, "of course, is implacably hostile to religion"). Other commentators have described Justice Stevens as "relentlessly secularist." Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 48 n.48 (2002).

[66] 450 U.S. 707 (1981).

[67] 489 U.S. 829 (1989).

[68] 480 U.S. 136, 147–48 (1987) (Stevens, J., concurring in the judgment).

[69] 482 U.S. 342, 354–68 (1987) (Brennan, J., dissenting).

[70] 508 U.S. 520, 540–41 (1993).

[71] 505 U.S. 577, 599–609 (1992) (Blackmun, J., concurring).

[72] 475 U.S. 503, 510–13 (1986) (Stevens, J., concurring).

[73] 476 U.S. 693, 716–23 (1986) (Stevens, J., concurring in part and concurring in the result).

[74] 471 U.S. 290 (1985).

[75] 490 U.S. 680 (1989).

[76] 493 U.S. 378 (1990).

[77] 461 U.S. 574 (1983).

[78] 485 U.S. 660 (1988).

[79] 494 U.S. 872 (1990).

claims challenging neutral laws of general applicability. This imbalance in results certainly is a proper place to begin an inquiry into Justice Stevens's free exercise jurisprudence.

When we examine Justice Stevens's written opinions, two striking points become apparent. First, for Justice Stevens, equality concerns are the primary, if not the only, acceptable foundation that supports judicial intervention to protect the free exercise of religion. There is virtually no discussion of the need to protect religious practice and autonomy as a liberty interest. In 1982, Justice Stevens concurred with the majority in *United States v. Lee* and rejected the free exercise claim of an Amish employer who sought an exemption from having to pay Social Security taxes for his employees.[80] In his concurring opinion, however, he argued for a different standard of review than the one applied by the majority. Rather than evaluating the cost and risk of granting the claimed exemption and concluding that it was unacceptable in this case, Justice Stevens argued the Court should hold "that there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid tax law that is entirely neutral in its general application."[81]

Justice Stevens recognized that his position was in "tension" with the Court's holdings in *Thomas* and *Sherbert v. Verner*, two cases mandating the award of unemployment compensation benefits to individuals whose adherence to their religious beliefs required them to leave their jobs.[82] The holdings in *Thomas* and *Sherbert*, however, could be defended on equality rather than religious liberty grounds. Justice Stevens explained that by analogizing employees with a religious reason for leaving their jobs to employees with physical impairments that made it impossible for them to work under changed circumstances, the Court's decisions "could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect."[83]

Four years later, in *Bowen*, Justice Stevens concurred in the Court's rejection of a free exercise claim challenging the use of a child's Social Security number as a precondition to her receiving welfare benefits to which she was otherwise entitled.[84] Recognizing that the child's parents might raise additional free exercise claims in the future if they were required to file forms containing the child's Social Security number, Justice Stevens explained that that these problems might be resolved under an equality analysis.[85] Accommodations are available for those who experience difficulties in filling out required forms because of mental, physical, or

[80] 455 U.S. 252, 254–61 (1982).

[81] *Id.* at 263 (Stevens, J., concurring in the judgment).

[82] *Thomas*, 450 U.S. 707, 720 (1981); *Sherbert*, 374 U.S. 398, 399–404 (1963).

[83] *Lee*, 455 U.S. at 263–64 n.3 (1982) (Stevens, J., concurring in the judgment).

[84] 476 U.S. 693, 716–23 (1986) (Stevens, J., concurring in part and concurring in the result).

[85] *See id.* at 720–21.

linguistic handicaps.[86] Accordingly, "it would seem that a religious inability should be given no less deference [because] our recent free exercise cases suggest that religious claims should not be disadvantaged in relation to other claims."[87]

The following year, in *Hobbie*, another unemployment compensation case, Justice Stevens's concurrence echoed these equality arguments.[88] Here, Florida violated the plaintiff's free exercise rights by treating the plaintiff's "religious claims less favorably than other claims."[89] Therefore, a constitutional accommodation was "necessary to protect religious observers against unequal treatment."[90]

The second point that becomes apparent when examining Justice Stevens's written opinions is that in addition to focusing on equality values as the basis for providing protection to free exercise rights in a limited class of cases, Justice Stevens identified equality concerns as his primary justification for rejecting any broader judicial intervention in support of religious liberty.[91] Thus, counterintuitive as it may seem initially, Justice Stevens acknowledges protecting religious liberty more often as a goal of the Establishment Clause than as a purpose of the Free Exercise Clause.[92] Equality, not liberty, is the foundation of his free exercise jurisprudence.

Justice Stevens provides the most complete explanation of why his concerns about religious equality require the denial of free exercise exemptions in *Goldman*.[93] Captain Goldman, an Air Force Officer and Orthodox Jew, sought an exemption from the military's uniform dress code requirements to allow him to wear a yarmulke, a small cap or head covering, required by his faith.[94] The military did not prohibit servicemen from wearing any religious apparel, but appeared to distinguish between visible and nonvisible apparel, permitting only the latter.[95] A yarmulke apparently crossed the line and was visible enough to be prohibited.

Justice Stevens concurred with the majority opinion rejecting Goldman's free exercise claim.[96] He argued that granting this exemption would create an unacceptable risk that military personnel from other faiths

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[86] *See id.* at 721.

[87] *Id.* at 722.

[88] 480 U.S. 136, 147–48 (1987) (Stevens, J., concurring).

[89] *Id.* at 148 (quoting *Bowen*, 476 U.S. at 722 n.17).

[90] *Id.*

[91] Indeed, as will be discussed in the next section, a similar emphasis on equality concerns seems to control his decision to uphold or strike down discretionary legislative accommodations of religion. *See infra* Part III.

[92] *See supra* notes 6–11 and accompanying text.

[93] 475 U.S. 503, 510–13 (1986) (Stevens, J., concurring).

[94] *Id*. at 504–05 (majority opinion).

[95] *See id.* at 508–10.

[96] *See id.* at 510–13 (Stevens, J., concurring).

would not receive neutral and uniform treatment with regard to their requests for comparable exemptions.[97] As Justice Brennan's dissenting opinion acknowledged, the Constitution does not prohibit the armed forces from imposing uniform dress requirements on military personnel, nor does it mandate the granting of all requests for exemptions by members of minority faiths obliged by their faith to wear religious apparel.[98] To Justice Brennan, this suggested a free exercise analysis pursuant to which some requests could be granted and others denied under a multifactor analysis taking into account the military's concerns about "functional utility, health and safety considerations, and the goal of a polished, professional appearance."[99] From Justice Stevens's perspective, however, the application of that kind of a standard would inevitably result in personnel from some faiths being denied exemptions while the religious obligations of members of other faiths would be accommodated.[100] Distinctions in the award of accommodations among Jews wearing yarmulkes, Sikhs wearing turbans, and Rastafarians wearing dreadlocks would necessarily reflect the majority's attitudes toward the faith seeking an exemption.[101] Neither the military nor the Court has any business in drawing such distinctions.[102] The challenged policy avoided this risk because it "[was] based on a neutral, completely objective standard—visibility."[103]

The Supreme Court's holding in *Smith II*[104] in 1990 vindicated the position Justice Stevens had endorsed in his concurring opinions in *United States v. Lee*[105] and *Goldman v. Weinberger*.[106] Free exercise claims could not be asserted against neutral laws of general applicability,[107] no matter how substantial the burden on religious practice might be or how unimportant the state's justification for refusing to grant an accommodation.[108] The Free Exercise Clause only came into play when the

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[97] *See id.* at 512–13.

[98] *See id.* at 515 (Brennan, J., dissenting).

[99] *Id.* at 519 (internal quotation marks omitted).

[100] *See id.* at 512–13 (Stevens, J., concurring).

[101] *See id.* Justice Blackmun agreed that basing the criteria for accommodation on whether or not religious apparel or grooming was consistent with a polished and professional appearance would result in discriminatory treatment in favor of mainstream religions and familiar faiths. *See id.* at 526–27 (Blackmun, J., dissenting).

[102] *See id*. at 513 (Stevens, J., concurring).

[103] *Id.*

[104] 494 U.S. 872 (1990).

[105] 455 U.S. 252, 261–64 (1982) (Stevens, J., concurring).

[106] 475 U.S. at 510–13 (Stevens, J., concurring); *see also supra* notes 80–83, 103–10 and accompanying text.

[107] *See Smith II*, 494 U.S. at 879.

[108] *Cf. id.* at 911, 920 (Blackmun, J., dissenting) (describing the state's interest in restricting the use of peyote for religious purposes as "the symbolic preservation of an unenforced prohibition" that, if taken seriously, could have a "potentially devastating impact" on respondents' religion).

state singled out religion or a particular faith for discriminatory treatment.[109] After *Smith II*, for free exercise purposes, religious equality was the only constitutional game in town.[110]

In *Church of the Lukumi Babalu Aye v. City of Hialeah*,[111] Justice Stevens demonstrated the strength of his commitment to religious equality in free exercise cases and how it was informed by equal protection principles. In *Hialeah*, the Court struck down a series of municipal ordinances prohibiting animal sacrifices.[112] Decided after *Smith II*, the *Hialeah* decision necessarily grounded its analysis on religious discrimination against a particular faith, in this case Santeria, an Afro-Cuban religion that uses slaughtered animals in rituals and ceremonies.[113] While the challenged regulations were not discriminatory on their face, Justice Kennedy's opinion emphasized that the ordinances prohibiting animal sacrifices constituted an impermissible "religious gerrymander."[114] That analysis drew support from a clear majority of the Court.[115] Justice Kennedy extended his argument, however, to include a section explicitly grounded in equal protection concerns.[116] Quoting from the record of the City Council meeting at which the challenged ordinances were adopted, Justice Kennedy concluded that the city's actions were invidiously motivated to suppress the Santeria faith.[117] No Justice other than Justice Stevens joined this section of Justice Kennedy's opinion.[118]

While Justice Stevens interpreted the Free Exercise Clause so narrowly that it provided religious individuals and institutions no protection against neutral laws of general applicability, he recognized that the political branches of government might grant religious accommodations in appropriate circumstances. These discretionary accommodations, however, must be carefully scrutinized to ensure that they did not violate Establishment Clause requirements. Here, again, religious equality was Justice Stevens's primary, although not his exclusive, concern.

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[109] *See id.* at 877 (majority opinion); *see also id.* at 908 (Blackmun, J., dissenting) (assuming that the majority viewed free exercise analysis as only applicable "to laws that expressly single out religious practices").

[110] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) (explaining that the *Smith II* decision "converts a constitutionally explicit liberty into a nondiscrimination requirement").

[111] 508 U.S. 520 (1993).

[112] *Id.* at 524–28.

[113] *Id.* at 525.

[114] *Id.* at 535 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) (internal quotation marks omitted).

[115] *Id.* at 522.

[116] *See id.* at 540–42.

[117] *See id.*

[118] *Id.* at 522.

III. THE RIGOROUS REVIEW OF DISCRETIONARY ACCOMMODATIONS

If we focus exclusively on the holdings of discretionary religious accommodations cases, Justice Stevens's decisions provide no clear sense of direction. Justice Stevens joined the majority opinions in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[119] and *Cutter v. Wilkinson*[120] upholding accommodation statutes. He wrote a concurring opinion supporting striking down the religious accommodation in *Board of Education of Kiryas Joel Village School District v. Grumet*[121] and joined the majority of the Court in invaliding accommodations in *Estate of Thornton v. Caldor, Inc.*,[122] *Larson v. Valente*,[123] and *Texas Monthly, Inc. v. Bullock*.[124]

These mixed results should not be entirely surprising. The decision to reject free exercise claims in *Smith II*,[125] after all, neither predicts nor controls judicial review of discretionary accommodations under Establishment Clause auspices. *Smith II* certainly does not require the invalidation of discretionary government accommodations of the exercise of religion. It explicitly acknowledges the possible legitimacy of such accommodations by assigning the task of determining when particular exemptions from neutral laws of general applicability should be granted to the political branches of government, rather than the judiciary.[126] Thus, a Supreme Court Justice who joined the majority opinion in *Smith II* could interpret the Establishment Clause to require only superficial and deferential review of the granting of such accommodations. Under this analysis, allocating responsibility for protecting religious liberty to the political branches of government required, or at least permitted, the Court to refrain from the kind of indeterminate balancing that the *Smith II* decision sought to avoid. This appears to be the Establishment Clause framework that Justice Scalia has adopted. He has voted to uphold every religious accommodation brought before the Court that was challenged for violating the Establishment Clause.[127]

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[119] 483 U.S. 327 (1987).

[120] 544 U.S. 709 (2005).

[121] 512 U.S. 687, 711–12 (1994) (Stevens, J., concurring).

[122] 472 U.S. 703 (1985).

[123] 456 U.S. 228 (1982).

[124] 489 U.S. 1 (1989).

[125] 494 U.S. 872 (1990).

[126] *See id.* at 890.

[127] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 743–45, 752 (1994) (Scalia, J., dissenting); *Tex. Monthly*, 489 U.S. at 33 (Scalia, J., dissenting); *see also* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 631 (2011) ("In his almost twenty-five years on the Court, Justice Scalia has never joined a majority to strike down a government action on Establishment Clause grounds.").

Justice Stevens took a very different approach. He reviewed religious accommodations far more rigorously than Justice Scalia and voted to strike down accommodations in *Kiryas Joel*,[128] *Estate of Thornton*,[129] *Larson*,[130] and *Texas Monthly*[131] on Establishment Clause grounds. Moreover, Justice Stevens was the lone member of the Court to argue in *City of Boerne v. Flores* that the Religious Freedom Restoration Act (RFRA) constituted an unconstitutional establishment of religion.[132] Unlike Justice Scalia, Justice Stevens recognized that the Court must exercise vigilant oversight in reviewing discretionary accommodations to determine whether they are consistent with Establishment Clause guarantees.

Justice Stevens did not contend that all exemptions are unconstitutional per se, however. As noted previously, he voted to uphold accommodations in *Amos*[133] and *Cutter*.[134] He also spoke approvingly of the legitimacy of some religion-specific accommodations in his dissent in *Board of Education v. Mergens*.[135] As Justice Stevens explained, a law serves a permissible and "proper" purpose if it is designed to lift "a regulation that burdens the exercise of religion, even if the resulting exemption does not 'come packaged with benefits to secular entities.'"[136] Most recently, Justice Stevens joined the Court's opinion interpreting RFRA in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, although that case did not involve an Establishment Clause challenge to RFRA's constitutionality.[137]

Because Justice Stevens recognized that the Court has important responsibilities under the Establishment Clause to monitor the constitutionality of discretionary religious accommodations, he and like-minded Justices had to develop a framework for adjudicating accommodations cases. Doing so was not an easy task. Indeed, if we look at the few opinions Justice Stevens authored in reviewing laws granting

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[128] 512 U.S. at 711–12 (Stevens, J., concurring) (striking a New York law that created a school district for a village dominated by one religious group).

[129] 472 U.S. 703, 708–11 (1985) (striking Connecticut law that gave employees "an absolute and unqualified right not to work on whatever day they designate as their Sabbath").

[130] 456 U.S. 228, 256–58 (1982) (Stevens, J., concurring) (striking a Minnesota law that imposed registration and reporting requirements on religious organizations that solicited more than fifty percent of their funds from nonmembers).

[131] 489 U.S. at 5 (striking a Texas law exempting religious periodicals from sales tax).

[132] 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

[133] 483 U.S. 327, 329–30 (1987) (upholding section 702 of the Civil Rights Act of 1964, which allows religious nonprofit employers to discriminate on the basis of religion in hiring employees).

[134] 544 U.S. 709, 720 (2005) (upholding the Religious Land Use and Institutionalized Persons Act's institutionalized-persons provision).

[135] 496 U.S. 226, 288 (1990) (Stevens, J., dissenting).

[136] *Id.* at 285 n.21 (quoting *Amos*, 483 U.S. at 338) (internal quotation marks omitted).

[137] *See* 546 U.S. 418, 423 (2006) (applying RFRA to protect the sacramental use of a controlled substance).

religious exemptions, it is difficult to clearly identify a set of criteria to consider or an analytic framework to employ.

Some of the cases seem idiosyncratic. In *Kiryas Joel*, for example, Justice Stevens argued that it violated the Establishment Clause for the state to carve out a special school district for a very religious Jewish sect in order to facilitate the religious group's ability to provide special education services to its children.[138] To Justice Stevens, it was unconstitutional to "affirmatively support[] a religious sect's interest in segregating itself and preventing its children from associating with their neighbors."[139]

In other cases, Justice Stevens's application of Establishment Clause principles seemed to overlap or serve as a proxy for free speech concerns. The accommodation in *Texas Monthly*, for example, exempted certain religious periodicals and books from a sales and use tax applicable to all other publications.[140] Although Justice Stevens joined Justice Brennan's opinion holding that the accommodation violated the Establishment Clause,[141] Justice White's concurring opinion demonstrates that the content-discriminatory statute was equally vulnerable to a Press Clause challenge.[142]

Justice Stevens was the only member of the Court to argue in *City of Boerne* that the RFRA not only exceeded Congress's power under Section Five of the Fourteenth Amendment, but also violated the Establishment Clause.[143] Justice Stevens's brief concurring opinion suggested that RFRA's implicit preference for religious expression, as opposed to irreligious expression, contributed to this latter conclusion.[144] Thus, Justice Stevens explained, while a religious organization using land for religious purposes, such as a church, could demand an exemption from local zoning laws under RFRA, a secular organization, such as a museum or art gallery, would not receive similar protection.[145] Justice Stevens may have chosen these expressive land-use examples of unacceptable preferences for religion over irreligion to emphasize his concern about the state's favoritism toward religious speakers in the marketplace of ideas.

The attempt to identify critical factors that influenced Justice Stevens's review of discretionary accommodations is not a futile enterprise, however. Notwithstanding idiosyncrasies and free speech analogies, if we look at the opinions Justice Stevens wrote or joined in accommodations cases, we may identify two constitutional concerns that are repeatedly recognized. One relates to religious equality, a core concern that is reflected throughout

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[138] 512 U.S. 687, 711–12 (1994) (Stevens, J., concurring).
[139] *Id.* at 711.
[140] 489 U.S. 1, 5–6 (1989).
[141] *Id.* at 5.
[142] *See id.* at 25–26 (White, J., concurring).
[143] 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring).
[144] *See id.* at 537.
[145] *See id.*

Justice Stevens's religion clause jurisprudence.[146] The other concern focuses on the impact of accommodations on nonbeneficiaries who bear the cost of regulatory exemptions.[147]

To Justice Stevens, equality of treatment among faiths was essential to the evaluation of religious accommodations under the Establishment Clause. Thus, for example, Justice Stevens joined Justice Brennan's opinion striking down a discriminatory exemption in *Larson*.[148] That analysis stated in ringing terms that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[149] Justice Stevens joined Justice Souter's opinion striking down the accommodation in *Kiryas Joel* in part because of the risk that the legislature's action in creating a separate school district for a particular religious faith might reflect a preference for "one religion to another, or religion to irreligion."[150] More importantly, in his concurring opinions in *United States v. Lee*[151] and *Goldman v. Weinberger*,[152] Justice Stevens emphasized the importance of nonpreferentialism for both the judiciary and the political branches of government. The plaintiff's free exercise claims must be rejected in both cases because of the "overriding [constitutional] interest in keeping the government—whether it be *the legislature* or the courts—out of the business of evaluating the relative merits of differing religious claims."[153]

Another core principle employed in the review of discretionary accommodations is the idea that on some occasions an accommodation simply goes too far and imposes an unacceptable burden or risk on others. Here, for example, Justice Stevens joined the Court's opinion in *Estate of Thornton* invalidating a Connecticut law imposing an absolute prohibition against employers requiring any of their employees to work on the Sabbath.[154] The Court held that "[t]his unyielding weighting in favor of Sabbath observers over all other interests" violates the Establishment Clause.[155]

Justice Stevens also joined Justice Brennan's opinion striking down a Texas statute that exempted periodicals published by a religious faith and books consisting entirely of sacred writings from the state's general sales

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[146] *See supra* notes 28–64 and 80–118 and accompanying text.

[147] *See infra* notes 154–62 and accompanying text.

[148] 456 U.S. 228, 255 (1982).

[149] *Id.* at 244.

[150] 512 U.S. 687, 703 (1994).

[151] *See* 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment).

[152] *See* 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring).

[153] *Id.* at 513 n.6 (emphasis added) (quoting *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring)) (internal quotation mark omitted).

[154] *See* 472 U.S. 703, 710–11 (1985).

[155] *Id*. at 710.

and use tax requirements.[156] Justice Brennan explained that this exemption violated the Establishment Clause because "[e]very tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become 'indirect and vicarious donors.'"[157] While broadly stated exemptions having this subsidy effect may withstand constitutional review, "when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," doing so violates Establishment Clause guarantees.[158] While it is not the sole criteria for invalidating a religion specific accommodation, the fact that an exemption "burdens nonbeneficiaries markedly" would seem to be a sufficient basis for striking the law down.

Most recently, Justice Stevens joined a unanimous Court in *Cutter* in upholding the prison provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) against an Establishment Clause challenge.[159] Notwithstanding the broad coverage of the statute, the rigorous standard of review it requires for laws that substantially burden prisoners' free exercise rights, and the fact that the law did not extend to secular activity, the Court rejected Ohio's contention that the RLUIPA was unconstitutional on its face because it impermissibly advanced religion.[160] In reaching this conclusion, however, the Court went out of its way to describe the way in which RLUIPA must be interpreted in order to withstand an as-applied challenge.

Thus, the Court explained, "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths."[161] Later in the opinion, the Court emphasized that "[s]hould inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order."[162] This cautionary language explicitly reinforces the Court's and Justice Stevens's concern that an accommodation can impose too great a

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[156] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989).

[157] *Id*. at 14 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983)) (internal quotation marks omitted).

[158] *Id*. at 15.

[159] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[160] *See id.* at 720–24.

[161] *Id*. (citation omitted).

[162] *Id*. at 726.

burden on the public or particular third parties, or operate too unfairly and unequally, to withstand constitutional review.

In a sense, both the review of accommodations to determine if they single out particular faiths for preferential treatment and the evaluation of accommodations to determine if they go too far in burdening nonbeneficiaries serve equality values. The former, of course, does so directly by invalidating denominational favoritism. The latter prevents government from unfairly burdening nonreligious individuals with the costs incurred in accommodating the religious practices of others.

IV. CONTINUING THE DIALOGUE: CRITICAL INQUIRIES AND EXTRAPOLATIONS

Justice Stevens's limited commitment to protecting religious liberty under the Free Exercise Clause and his emphasis on equality values rather than liberty values in interpreting both of the religion clauses raise a host of questions that cannot be convincingly answered by examining Justice Stevens's many opinions. Justice Stevens forcefully explained the foundational principles that underlay his rigorous commitment to Establishment Clause doctrine. He also identified the critical concerns that, in his judgment, cast doubt on the legitimacy and utility of judicial intervention to protect the free exercise of religion. The connection between the principles defining his Establishment Clause jurisprudence and the concerns he expressed about free exercise accommodations were seldom discussed, however. Nor did Justice Stevens's identification and analysis of these concerns provide full closure to the debate in the courts and the larger community about the scope of free exercise rights and the legitimacy of discretionary accommodations.

Justice Stevens's writings and judicial judgments represent a powerful statement of a thesis that opens a debate about the meaning of the religion clauses and our constitutional commitment to religious liberty and equality. Justice Stevens's doctrinal position supporting a vigorously enforced and expansive interpretation of the Establishment Clause and a much more limited and lenient understanding of free exercise rights is clearly stated, as is his emphasis on religious equality, but not religious liberty, values. But this description is only the beginning of the constitutional discourse on his jurisprudence. When we read the opinions Justice Stevens has written and joined, there is often no ongoing point and counterpoint or argument and rebuttal completing the discussion. In response to that unfinished dialectic, this Article attempts to continue the conversation about Justice Stevens's religious liberty jurisprudence. It does so in part by identifying open questions that remain troubling, and in part by presenting counterpoints grounded in principles Justice Stevens acknowledged to be of constitutional significance, either directly in his own writings or indirectly by joining the opinions of other Justices.

A. Equality Challenges to the Denial of Free Exercise Exemptions

If we return to *Goldman v. Weinberger*,[163] the roots of an equality-based challenge to Justice Stevens's free exercise jurisprudence can be unearthed. Justice Stevens argued that beginning down the road of granting exemptions from the military's dress code requirements would require the Court to evaluate religious practices and draw distinctions among faiths—a process that would inevitably raise religious equality concerns.[164] Upholding the current neutral policy that distinguished between visible and nonvisible additional apparel avoided the risk of unequal treatment among faiths.[165] Justice Brennan dissented in *Goldman* and disputed Justice Stevens's equality analysis. To Justice Brennan, there was nothing intrinsically neutral or evenhanded about a regulation distinguishing between visible and nonvisible religious apparel.[166] In reality, this distinction accommodated the beliefs of majority religions in the United States, whose faiths do not require adherents to wear distinctive and obvious apparel, but ignored minority faiths, whose religions do impose such obligations on believers.[167] Thus, Justice Brennan argued, Justice Stevens's contention that the contested dress code advances the uniform treatment of all faiths is mistaken "unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices."[168]

There is a limit to the extent that Justices can engage in back-and-forth dialogue in their written opinions, and in this case Justice Stevens did not directly respond to Justice Brennan's argument. The lack of continued discussion here is regrettable. This equality-based distinction between judicial or legislative accommodations of some, but not all, minority faiths and general laws that avoid the burdening of religious majorities while denying accommodations to all minority religions is one of the critical fault lines on which Justice Stevens's free exercise jurisprudence is grounded. As such, it deserves a full explanation and defense.

To be sure, Justice Stevens made it clear in *Goldman* and other cases that his primary concern in rejecting constitutionally mandated or discretionary religious accommodations was "keeping the government . . . out of the business of evaluating the relative merits of differing religious claims. The risk that government approval of some and disapproval of others will be perceived as favoring one religion over another is an

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[163] 475 U.S. 503 (1986).

[164] *Id.* at 511–13 (Stevens, J., concurring).

[165] *See supra* notes 93–103 and accompanying text.

[166] *See Goldman*, 475 U.S. at 520–22 (Brennan, J., dissenting).

[167] *See id.*

[168] *Id.* at 522.

important risk the Establishment Clause was designed to preclude."[169] What is unclear is why he believes that this risk is less serious when government adopts general and allegedly neutral laws or policies that conform to the religious beliefs and practices of the majority while burdening members of minority faiths. There are several possible answers to this question. I am not certain that any of them reflect Justice Stevens's rationale for his position. Continuing the constitutional dialogue here requires considerable extrapolation.

One argument that ostensibly builds on Justice Stevens's analysis in *Goldman* suggests that drafting general laws which are sensitive to the majority's beliefs and practices while ignoring the interests of minority faiths is less likely to be perceived as religious favoritism than the granting of discrete exemptions to certain faiths but not others. Neutral laws of general applicability cause less of an affront to minorities because they are neutral on their face and generally applicable to everyone. Thus, the equality costs resulting from such laws are measured and tolerable. This argument, however, is also open to question.

1. Status Disparagement and Alienation.—We cannot simply assume that a "no accommodations" policy denying exemptions from neutral and generally applicable laws to all minority faiths is less likely to be perceived as religious favoritism because no minority receives preferential treatment. As an empirical matter, this contention is certainly open to debate—with the important caveat that everyone's conclusions on these issues are based on intuitions rather than data. Perhaps members of some minority faiths will understand that the denial of exemptions they seek are based on neutral and legitimate concerns. If the sought-after accommodation imposes serious burdens on third parties, for example, religious individuals may believe that, on balance, the exemption should be granted, while recognizing that its denial does not reflect bias against their community or favoritism for larger faiths. With regard to other exemption claims, however, as to which the state's basis for rejecting the claim is insubstantial, I suspect that religious groups and individuals denied exemptions will experience that rejection as the disfavoring of their faith. The fact that other minority faiths are also denied accommodations will not mitigate the reality that the neutral and generally applicable law from which an exemption is sought avoids the burdening of majoritarian religious practices.

We can extend this discussion beyond the comparison of general intuitions about perceptions of unequal treatment and examine the problem of free exercise exemptions by reference to the same concerns that exemplify Justice Stevens's Establishment Clause jurisprudence. As we

[169] United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment); *accord Goldman*, 475 U.S. at 512–13 (Stevens, J., concurring) (noting that the Air Force has "no business" deciding which religious modes of dress are acceptable and which are not).

have seen, Justice Stevens often employs Justice O'Connor's endorsement test in cases involving religious displays on public property.[170] That test in its essence is an equality mandate.[171] It focuses, as do many of the opinions Justice Stevens has written and joined in this area, on the sensibilities and status of religious minorities.[172] A religious display representing the tenets of one faith or multiple faiths offends and alienates the members of other religious groups.[173] Such displays violate the Establishment Clause if they express a message of religious preferentialism that favors certain religions over others.[174]

It is fair to ask, however, whether minority faiths experience a similar or even greater sense of offense, alienation, and unequal treatment when the government refuses to exempt them from laws that substantially burden the practice of their religion. Religious sensibilities may be just as injured by a regulation interfering with liberty as they are by a display expressing a message of inequality. Arguably, the adoption of general laws that avoid the burdening of religious practices of majority faiths while ignoring the interests of religious minorities also sends a message to minorities "that they are outsiders, not full members of the political community"[175] that is at least as powerful as the message conveyed by placing majoritarian religious displays on public property. Surely, the decision to construct a road adjacent to Native American sacred sites that makes it impossible for believers to practice their faith may be understood to send a message of disrespect to the adherents of the burdened faith.[176] Similarly, the refusal to exempt the members of Native American religions who use peyote in religious rituals from laws prohibiting the possession and use of this

[170] *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803, 1832–37 (2010) (Stevens, J., dissenting); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–10 (2000); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 649 (1989) (Stevens, J., concurring in part and dissenting in part); Marsh v. Chambers, 463 U.S. 783, 822–23 (1983) (Stevens, J., dissenting).

[171] *See, e.g.*, Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 845 n.38 (2001) (listing commentary characterizing the endorsement test as focusing on religious equality); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1069 (1986) (interpreting the endorsement test as one that prohibits government from placing a "badge of inferiority" on religious minorities).

[172] *See supra* Part I.C.

[173] *See* Van Orden v. Perry, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting).

[174] *See id.* at 709.

[175] Lynch v. Donnelly, 465 U.S. 668, 688 (O'Connor, J., concurring).

[176] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988) (holding that the Free Exercise Clause does not prohibit the government from constructing a road through part of a National Forest traditionally used for religious purposes by American Indian tribes).

"controlled substance"[177] may be perceived as communicating the message that this faith's religious practices need not be taken seriously.[178] The fact that other minority faiths would be denied comparable accommodations may do little to reduce this perception. The major faiths in the United States have no sacred sites in this country comparable to Native American beliefs, and alcoholic beverages such as wine, which are used in Judeo-Christian rituals, are not a controlled substance despite the recognized risks associated with alcohol abuse.[179]

Arguably, there is a symmetry of attitudes and experiences that underlay both Establishment and Free Exercise Clause disputes in this area. Legislators, judges, and administrative officials who adhere to or are familiar with the beliefs of the religious majority do not perceive government expression of commonly accepted religious messages as sectarian, preferential, or even religious in their content.[180] Religion and American culture merge in a way that suggests some religious ideas are

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[177] *Smith II*, 494 U.S. 872, 874, 890 (1990) (holding that the Free Exercise Clause did not protect ceremonial ingestion of peyote from state-controlled substance law and that employees terminated for work-related misconduct based on their use of the drug could be denied unemployment compensation).

[178] *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 228–29 (2001).

[179] *See* Douglas Laycock, *Peyote, Wine and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 876, 877–78 (explaining that when alcohol was prohibited, there were exemptions for its use for sacramental purposes and that today, the use of alcohol is rarely prohibited). Alcohol abuse is much more prevalent in the United States than peyote abuse. According to the National Survey of Drug Use and Health, in 2009 1.4% of persons in the U.S. reported using peyote. *Peyote: Ever Used Peyote*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://www.icpsr.umich.edu/icpsrweb/SAMHDA/ssvd/studies/29621/datasets/0001/variables/PEYOTE (last visited June 30, 2012). By comparison, according to the Center for Disease Control and Prevention (CDC), more than 38 million adults in the United States engage in binge drinking (consuming four or five alcoholic drinks in a short period of time). Excessive drinking "causes 80,000 deaths in the US each year and, in 2006 cost the economy $223.5 billion." *Binge Drinking*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 2012), http://www.cdc.gov/vitalsigns/BingeDrinking/index.html. The CDC also reports that "[i]n 2009, 10,839 people were killed in alcohol-impaired driving crashes, accounting for nearly one-third (32%) of all traffic-related deaths in the United States." *Impaired Driving: Data & Statistics*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/Motorvehiclesafety/Impaired_Driving/data.html (last visited June 30, 2012).

[180] A blatant example of this tendency occurred in the oral argument in *Salazar v. Buono*, a case involving an Establishment Clause challenge to the use of a stand-alone cross as a World War I memorial. 130 S. Ct. 1803, 1811 (2010). Justice Scalia asked incredulously, "The cross doesn't honor non-Christians who fought in the war? . . . It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the—the cross is the—is the most common symbol of . . . the resting place of the dead . . . ." Transcript of Oral Argument at 38–39, *Salazar*, 103 S. Ct. 1803 (No. 08-472). When counsel replied, "The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew," *id.* at 39, Justice Scalia responded that the idea that a cross only honors Christian war dead is "an outrageous conclusion," *id.*; *see also* JOAN DELFATTORE, THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS 14 (2004) (explaining that in the American Common Schools in the late 1830s, "daily readings from the King James Bible, which was generally accepted by Protestants but not by Catholics and non-Christians," was considered to be nonsectarian).

simply what Americans believe.[181] To members of minority faiths, however, generic Protestant, Christian, and other monotheistic messages are neither neutral nor nonpreferential. They endorse the beliefs of faiths other than their own and implicitly reject the religious beliefs to which they adhere.[182]

Similarly, military authorities prohibiting the wearing of hats other than head gear that is a standard part of a military uniform may not view this regulation as one that discriminates in favor of Christians and against Orthodox Jews and Sikhs. Schools, public agencies, and public employers may not consciously recognize that scheduling sporting events, work assignments, and public programs on Saturday rather than Sunday disfavors religious individuals who observe Saturday as opposed to Sunday as their Sabbath. Not scheduling activities on Sunday is just the normal way of doing things.[183] The open question is why this failure to recognize the preferential nature of government conduct requires constitutional intervention in the case of Establishment Clause challenges to majoritarian religious displays while intervention is rejected in the case of free exercise claims challenging preferential regulations that burden the religious exercise of minority faiths.

2. Divisiveness.—Justice Stevens's Establishment Clause concerns about government-sponsored religious displays and prayers were not limited to antipreferentialism values and a commitment to equality of status for all religious faiths and nonbelievers. Justice Stevens often also expressed serious misgivings about government decisions that increase religious divisiveness and bring religious differences into the political arena.[184] Accordingly, here again we may ask whether political debates about accommodating religious practice are intrinsically less divisive than debates about public prayer and religious displays.

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[181] *See* DELFATTORE, *supra* note 180, at 52–53; *see also id*. at 69–71 (describing how the New York Board of Regents believed that the monotheistic prayer they adopted to be recited in public schools was normative, nonsectarian, and "a fundamental element of American heritage and identity . . . [because] the beliefs it promoted were so widely shared that they did not appear to be doctrinal but were simply taken for granted"); Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37, 52 (1991) (explaining how educational leaders in the Common Schools believed that the Protestant theology taught in public schools was not intended to "victimize Catholics," but was thought to be "fair to all and harmful to none").

[182] *See, e.g*, DELFATTORE, *supra* note 180, at 15 (discussing how Catholics and some Protestants viewed generic Protestantism taught in Common Schools in the 1800s "as a distinct religious tradition, since it includes some faiths and excludes others"); Laycock, *supra* note 181, at 40, 63 (explaining that the crèche or nativity scene is "heretical or blasphemous to Judaism and Islam" as is praying "to or in the name of Christ").

[183] *See* Nakashima v. Or. State Bd. of Educ., 185 P.3d 429, 433–34 (Or. 2008).

[184] *See Salazar*, 130 S. Ct. at 1832 (Stevens, J., dissenting); Van Orden v. Perry, 545 U.S. 677, 719–20 (2005) (Stevens, J., dissenting); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–11 (2000).

Certainly, there is substantial evidence to suggest that the debate about government regulations substantially burdening religious practices and the granting or rejecting of requests for exemptions and accommodations have been intensely divisive. In some cases, the enactment of laws interfering with religious practice and the rejection of exemptions has reflected unconcealed animosity toward minority faiths. The U.S. government was all but at war with the Mormon Church over the issue of polygamy.[185] The City of Hialeah was openly contemptuous of the Santeria faith.[186] In other cases, proponents of accommodations accuse the other side of hostility toward religion and accommodation opponents assert the insensitive unwillingness of religious groups to subordinate their private prerogatives to the public good, as everyone else must do.[187] Local battles over the zoning and regulation of land to be used for religious purposes are often bitterly contested.[188] Debates over religious exemptions from civil rights laws result in both sides feeling threatened and marginalized.[189] If avoiding

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[185] *See, e.g.*, MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 111–23 (2d ed. 2006) (describing how the federal government sought to disenfranchise Mormons, prevent Mormon leaders from holding office, dissolve the corporate Church, and seize its property); Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167, 169–72 (1992) (describing how the Mormon Church's rejection of polygamy was necessary to ensure its survival).

[186] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525–28 (1993).

[187] In one such case, Winnifred Sullivan describes the intensity of feeling generated by the City of Boca Raton's belated decision to enforce regulations prohibiting anything other than flat markers that did not extend above the ground to identify burial plots in the municipal cemetery. WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 13–31 (2005). A local newspaper described the cemetery plot owners and relatives supporting the regulations as demonstrating "fierce opposition to the fancy shrines that litter the city's graveyard." *Id.* at 21. They contended that "the hodgepodge of items [made] the place look like Coney Island." *Id.* The defenders of aboveground markers were equally outraged. As one owner of a plot with an above ground marker protested, "[A]ll I could think in my mind was the beginning of the Holocaust. The first thing they did was . . . knocked down stones and desecrated the cemeteries. And I felt this was trodding [sic] on my religion and trodding [sic] on the religion of my loved one." *Id.* at 44 (alterations in original).

[188] *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 97 (2005) ("RLUIPA has turned neighbor against neighbor and is one of the most religiously divisive laws ever enacted in the United States."); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1847–48 (2004) ("RLUIPA has generated a backlash against church influx by communities fearful that, once settled, congregations will have an unfettered ability to expand their operations without regard to local land-use concerns.").

[189] On the intensity of the debate over religious accommodations of objectors to same-sex marriage, see generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008) (exploring the religious freedom implications that emerge when marriage is expanded to include same-sex couples). Specific commentary illustrates the divisiveness of this issue. *See, e.g.*, Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 214 (reviewing SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra*, and characterizing demands for religious accommodations from the perspective that "every hard-won escape from the caste [in which gays and lesbians have been placed] is propagandized into an attack on the liberty of the people who created the caste system and put you in it"); Mary Ann Glendon, Op-Ed., *For Better or for Worse?*, WALL ST. J., Feb. 25, 2004, at A14 ("Gay-marriage proponents use the language of openness,

political divisions related to religion is a constitutional value, that concern may apply with considerable force to regulatory exemptions as well as religious displays.

B. The Problematic Nature of Adjudicating Free Exercise Claims

The arguments described above are hardly the last word in this discussion. Additional important rejoinders need to be considered. Continuing the dialogue even further from this point is necessary, but it is also increasingly attenuated from its source. Identifying and presenting these rejoinders draws us further and further from Justice Stevens's opinions and the judgments he has joined.

One possible response to the arguments I have presented regarding alienation and divisiveness is to distinguish the adjudication of claims for religious exemptions from challenges to government displays expressing religious messages. While the harms caused by burdening religious practice and endorsing favored faiths may be comparable in some ways, there are stark differences between these constitutional claims with regard to the ability of courts to resolve them. Even if neutral laws of general applicability are perceived by religious minorities to be unequal and unfair, there may be important institutional reasons why the courts are ill-suited to evaluate free exercise challenges and provide plaintiffs the remedy they seek.

Two basic distinctions may help to explain the differences in doctrinal approach between Justice Stevens's Free Exercise and Establishment Clause jurisprudence. First, it may be far more difficult and intrusive for courts to police regulatory interference with religious exercise than it is for the courts to monitor and limit government messages endorsing religion. The former task involves constant evaluation of the basic bread-and-butter work of government while the latter relates to state action that has little to do with the state's core functions. Second, adjudicating free exercise claims may exceed the competence of courts and require them to intrude into what are essentially legislative prerogatives. The review of government messages endorsing religion avoids both of these concerns. We can consider each of these related arguments in turn.

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tolerance and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination the likes of which we have rarely seen before."). Other cases involving requests for exemptions often involve assertions of hostility toward a specific religion. One plaintiff in *Smith II* described his feelings about his case this way: "You go to church, and then you get terminated . . . . It is a continuation of being put down, of my people and our religion not being recognized by you newcomers. They just riled me up to the point where I'm ready for a fight. Do you want to fight? Okay.'" EPPS, *supra* note 178, at 111 (internal quotation marks omitted); *see also* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 87 n.11 (Cal. 2004) (discussing but rejecting plaintiff's argument that the California legislature "acted out of antipathy and spite toward the Catholic Church" in refusing to create an exemption from the Women's Contraceptive Equity Act for Catholic Charities).

1. The Unavoidability of Burdening Religious Exercise.—The burdening of minority faiths by neutral and generally applicable laws is unavoidable in our society. The range of religious diversity in our communities is so vast that conflicts between law and religious practice are inevitable. Government cannot do its job without enacting laws that burden some faith's religious practice.[190]

The problem created by government-sponsored religious displays is arguably more limited and more susceptible to judicial management and resolution. Government does not need to endorse religious beliefs to carry out its core functions. Prohibiting endorsements does not impose costs on third parties.[191] Thus, enforcing the Establishment Clause in religious display and public prayer cases interferes with government far less than mandating exemptions from laws.

There is some truth to this contention, but it may be seriously overstated. While government does not need to endorse religion, it often may have legitimate reasons for expressing religious messages. Justice Stevens explicitly recognizes that it is constitutionally permissible for government to "acknowledg[e] the religious beliefs and practices of the American people."[192] Further, "works of art or historic memorabilia" need not be hidden because they contain religious content.[193] Some religious statements by government officials are acceptable because government actors have a private as well as a public dimension to their lives, and the two cannot always be separated or differentiated.[194] Although Justice Stevens has not opined on this issue, even strong supporters of the separation of church and state agree that in times of national emergency or calamity, government can express religious sentiments to the community.[195]

Indeed, unless one believes that the Constitution requires that all religious references must be purged from the public life of our society (a position Justice Stevens clearly rejects),[196] some state religious expression has been, is, and will continue to be a continuing part of American culture.

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[190] *See, e.g.*, *Smith II*, 494 U.S. 872, 888 (1990) ("Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect [a state] interest of the highest order." (emphasis omitted) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961))).

[191] *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317–19 (1996) (noting that government can effectively enforce its laws without determining the proper modes of worship or form of church governance; it is government endorsements of religion that create conflict and suffering).

[192] Van Orden v. Perry, 545 U.S. 677, 711 (2005) (Stevens, J., dissenting).

[193] *Id.*

[194] *See id.* at 723.

[195] *See* William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 31–33 (2002).

[196] *See supra* notes 192–94 and accompanying text; *infra* notes 225–31 and accompanying text.

While state endorsements of religion may violate the Establishment Clause (and I largely agree with Justice Stevens that they do), endorsements do not come close to exhausting the set of state action communicating religious content. Religious expression in the public sector has a place in the constitutional scheme of things. Demanding that the government of the United States or state and local authorities completely refrain from communicating any religious content may be an implausible goal—just as it is unrealistic to insist that government regulations may never interfere with religious exercise. The problem here may not be as unavoidable as laws that burden someone's religious practice or conduct, but religious discourse cannot be neatly excised from state expressive activity.[197]

2. The Problem of Subjective, Value-Based Balancing.—The second distinction between claims for free exercise exemptions and Establishment Clause challenges to state religious expression may be more persuasive in explaining Justice Stevens's reluctance to countenance the former cause of action while supporting the latter kind of claim. Conflicts between neutral laws of general applicability and religious exercise are not only inevitable in a religiously diverse society; they are also not susceptible to resolution through constitutionally mandated accommodations. The adjudication of free exercise claims seeking exemptions from general laws would require judges to employ unacceptably subjective and uncertain balancing tests that cannot be fairly or consistently administered. Subjective balancing leads to incoherent doctrine and unpredictable holdings. It also undermines separation of powers principles by all but compelling judges to rely on their personal values, backgrounds, and policy preferences in adjudicating cases. Concerns about the difficulty and impropriety of balancing free exercise rights and competing state interests was clearly one of the central themes of the Court's opinion in *Smith II*, which Justice Stevens joined.[198]

The policing of religious expression by government to determine whether it constitutes a prohibited endorsement, on the other hand, arguably

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[197] Justice O'Connor recognized the implausibility of the government's completely refraining from religious communication in the pledge of allegiance case when she stated that eradicating religious references entirely would "sever ties to a history that sustains this Nation even today." *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring in the judgment). Using the constitutional shorthand of ceremonial deism, Justice O'Connor described how religious references—limited by their history, ubiquity, absence of worship, and lack of reference to a particular religion—can serve constitutionally acceptable, secular purposes. *Id.* at 37–44.

Other scholars have discussed the concept at length. *See, e.g.*, Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 520–21 (1992) (finding "safe, under any Establishment Clause 'test,'" the observance of Christmas and Thanksgiving, "In God We Trust" on currency, and "under God" in the Pledge of Allegiance); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207 n.59 (1992) (arguing that "we need not melt down the national currency to get rid of 'In God We Trust'" since it is at most a *de minimis* endorsement).

[198] *See Smith II*, 494 U.S. 872, 888–89 (1990).

avoids the kind of subjective balancing required by a rigorous free exercise regime. Indeed, it does not require any comparison of rights and competing state interests at all. Thus, the enforcement of this constitutional guarantee by the judiciary does not exceed the competence of courts or assign to judges the kind of policy choices that are more appropriately determined by the political branches of government.

This argument is subject to two powerful rejoinders, however. First, judicial evaluation of state-sponsored prayers and religious displays to determine whether they constitute an impermissible endorsement of religion may be as subjective, value-laden, and unpredictable as the adjudication of free exercise claims under some form of rigorous scrutiny. Second, assigning decisions as to whether or not to grant a religious accommodation to the political branches of government may not avoid subjective and indeterminate judicial evaluations of these accommodations. Establishment Clause review to determine whether discretionary accommodations favor certain faiths over others and whether they burden nonbeneficiaries to an unacceptable extent may turn out to be just as value-laden and uncertain as the adjudication of free exercise claims in the first place.

a. Subjectivity in policing endorsements.—It is not at all clear that the adjudication of free exercise claims is as *uniquely* vulnerable to concerns about unpredictability and subjectivity as the above criticism suggests. Determining what constitutes an impermissible endorsement or advancement of religion by government speech and sponsored activities may be as subjective, unpredictable, and value-laden a decisionmaking process as balancing a free exercise claim against the state's interest in refusing to grant an exemption from a general law. While identifying prohibited endorsements of religion does not involve formal balancing, it requires a relatively open-ended evaluation of "social facts"[199] based on the text and history of state action and the cultural environment[200] in which the

[199] *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts."). Justice Stevens clearly considered such social facts in his opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307–08 (2000), in which he examined the history and context of prayers offered at school-sponsored athletic functions in applying the Establishment Clause.

[200] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 775–76 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (evaluating the open nature of the forum, private ownership of the display, and presence of a sign disclaiming government sponsorship); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 633–35 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (evaluating the physical setting and context of pluralism in which religious symbols were displayed); *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (evaluating the content and overall holiday setting in which the créche was displayed in determining whether it endorses Christianity).

alleged endorsement occurs.[201] That analysis has proven to be as subjective and unpredictable as balancing.

The indeterminacy and subjectivity inherent in applying the endorsement test has been recognized by numerous commentators.[202] In part, this is because social facts are often in the eye of the beholder. The reasonable objective observer, whose assessment controls the court's analysis of whether an endorsement exists, has to view a religious display from some perspective, and the range of such perspectives in American society is very broad. Put simply, there does not seem to be any consensus on the meaning of social facts when religious displays are at issue. This problem is theoretically solvable: the Court could adopt one perspective through which all endorsement questions would be answered. But it has not done so, and there is little evidence that even those Justices who support the endorsement test can agree on its meaning or application.

Justice O'Connor, who created the endorsement test, for example, disagreed with Justices Brennan, Blackmun, and Stevens as to what constituted an endorsement of religion in *Lynch v. Donnelly*,[203] a case upholding a government sponsored and subsidized Christmas display including a crèche, Santa's house, a sleigh pulled by reindeer, a wishing well, and other figures and structures[204] against an Establishment Clause challenge. To Justice O'Connor, the display at issue did not endorse Christianity. Its purpose and effect "was not promotion of the religious content of the crèche but celebration of the public holiday [of Christmas]

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[201] Even Justice Scalia resorts to his subjective understanding of social facts in reviewing the constitutionality of religious displays. In challenging the majority's contention that the Ten Commandments display at issue advanced a particular religion because it adopted one version of the Ten Commandments, Justice Scalia offered two responses. First, he suggested that "the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear they were not posted to take sides in a theological dispute." McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting). Second, he argued that

> [t]he sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not). In any event, the context of the display here could not conceivably cause the viewer to believe that the government was taking sides in a doctrinal controversy.

Id. at 909 n.12. This analysis is, obviously, a highly subjective interpretation of social facts, and one on which scholars disagree. *See, e.g.*, Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1482–83 (2005) (describing the debate over the different interpretations and translations of the Ten Commandments).

[202] *See, e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 510–21 (2002); William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533–35 (1986); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148–57 (1992); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No-Endorsement' Test*, 86 MICH. L. REV. 266, 292–95 (1987).

[203] *See Lynch*, 465 U.S. at 690–91 (O'Connor, J., concurring).

[204] *Id.* at 671–72 (majority opinion).

through its traditional symbols."[205] While the dissenting Justices did not adopt the endorsement test as the framework for adjudicating Establishment Clause disputes relating to religious displays, they left little doubt that that they considered the crèche display to be an unconstitutional endorsement of Christian beliefs. By including a nativity scene in the display, the city placed "the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views."[206]

The disarray and differing perspectives were even more pronounced in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*.[207] At issue, in part, in this case was the constitutionality of a Pittsburgh holiday display identified by a sign stating "Salute to Liberty"[208] and including a forty-five-foot Christmas tree and an eighteen-foot Chanukah menorah.[209] Justice Blackmun adopted the endorsement test and concluded that the dual display and sign communicated a message of "of cultural diversity" rather than an endorsement of Christianity and Judaism.[210] In Justice Blackmun's judgment, the Christmas tree was understood to be a secular symbol.[211] The Chanukah menorah was more of a religious symbol, but in the context of the December holiday season both Chanukah and the menorah became increasingly secularized.[212] The religious meaning of the menorah might still raise constitutional concerns about its inclusion in the display, but because no less religious, alternative symbol of Chanukah was available to celebrate the holiday in more secular terms, the display survived constitutional review.[213]

Justice O'Connor agreed with Justice Blackmun's conclusion, but not with his analysis.[214] She argued that Chanukah and the menorah were intrinsically religious.[215] To Justice O'Connor, the "the specific practice in question in its particular physical setting and context" including the sign, the Christmas tree, and the menorah communicated a message of pluralism rather than endorsement.[216]

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[205] *Id.* at 691 (O'Connor, J., concurring).

[206] *Id.* at 701 (Brennan, J., dissenting).

[207] 492 U.S. 573 (1989).

[208] *Id.* at 582 (internal quotation marks omitted). The full message on the sign stated: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* (internal quotation marks omitted).

[209] *Id*. at 587.

[210] *Id.* at 619.

[211] *See id.* at 616–17.

[212] *See id.* at 617–18.

[213] *See id.*

[214] *See id*. at 632–34 (O'Connor, J., concurring in part and concurring in the judgment).

[215] *Id*. at 633–34.

[216] *Id.* at 636–37.

Justice Brennan disagreed with both Justices Blackmun and O'Connor.[217] He suggested that it was much more likely that the menorah reinforced the religious significance of the Christmas tree than it was that the tree somehow secularized the menorah.[218] More importantly, Justice Brennan seemed to challenge the idea that an "endorsement" of religion depended on the understanding of a "reasonable observer" with specific ideas about the context of a display.[219] Such a standard, he suggested, would make the Court's analysis "under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law."[220]

Justice Stevens wrote separately. While he eschewed identifying the constitutional infirmity with religious displays as "coercion," "endorsement," or "state action with the purpose and effect of providing support for specific faiths,"[221] Justice Stevens maintained that the Establishment Clause creates "a strong presumption against the display of religious symbols on public property."[222] This presumption, however, is hardly conclusive, "for it will prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular."[223] The dual display in the instant case was not sufficiently nonsecular in its message to avoid invalidation as a double establishment of religion.[224]

While the strength of the presumption against government-sponsored religious displays on public property advocated by Justice Stevens has the potential to limit the scope of this problem, it cannot eliminate uncertainty and subjectivity in adjudicating this class of cases. Justice Stevens's analysis requires "th[e] careful consideration of context,"[225] and contextual analysis is necessarily indeterminate. Thus, Justice Stevens recognizes numerous circumstances where government-sponsored displays with religious content would not violate the Establishment Clause. The inclusion of secular figures as well as religious leaders may neutralize the message of a display.[226] The presentation of clearly religious works of art in a public museum reflects the quality of the work, not the content of the painting or sculpture.[227] State action that acknowledges "the religious beliefs and practices of the American people" is not intrinsically unconstitutional.[228]

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[217] *Id.* at 637 (Brennan, J., concurring in part and dissenting in part).

[218] *See id.* at 642.

[219] *Id*. at 642–43.

[220] *Id.* at 643.

[221] *Id.* at 649–50 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

[222] *Id.* at 650.

[223] *Id.* at 652.

[224] *See id.* at 653–54.

[225] *Id.* at 653.

[226] *See id.* at 652–53.

[227] *See id.* at 653.

[228] Van Orden v. Perry, 545 U.S. 677, 711 (2005) (Stevens, J., dissenting).

Historical documents with religious content may be publicly displayed.[229] There may be a place for ceremonial deism.[230] Religious statements by public officials may reflect the permissible personal statements of individuals rather than the voice of the government.[231]

This list is not exclusive, nor could it be. Given the history, culture, and religious demography of the United States, questions regarding the constitutionality of religious displays and messages will always involve some significant level of uncertainty. That reality does not necessarily undermine Justice Stevens's insistence on a strong presumption that government-sponsored religious displays violate the Establishment Clause. This comparison between the ambiguities of the endorsement test and the uncertainty intrinsic to free exercise balancing, however, raises questions about whether both constitutional inquiries are equally problematic, and, accordingly, whether they both should be equally acceptable or unacceptable for religion clause purposes.[232]

b. Subjective balancing is unavoidable.—Another open area of inquiry involves a more fundamental challenge to the antibalancing arguments that are so intrinsic to the reasoning of the *Smith II* decision, and, perhaps, to Justice Stevens's free exercise jurisprudence. The challenge to the judicial competence and propriety arguments set out in *Smith II* extends beyond the argument that applying the endorsement test in religious display and public prayer cases involves a similar degree of subjectivity and balancing as the adjudication of free exercise claims for exemptions from neutral laws of general applicability. What if the review of discretionary accommodations of religion under Establishment Clause auspices required the Court to engage in the same kind of subjective, unpredictable, and value-laden balancing of religious liberty and state interests that the majority opinion in *Smith II* so forcefully rejected for the adjudication of free exercise claims?

Part III of this Article identified two principles that Justice Stevens considered in determining whether a discretionary accommodation of religion violated the Establishment Clause. First, some accommodations violate religious equality principles and provide exemptions to preferred

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[229] *Id.*

[230] *See id.* at 711, 723; *supra* note 197. The idea and scope of ceremonial deism remains controversial. *See, e.g.*, Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1574–83 (2010); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2137–54 (1996).

[231] *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting).

[232] *See generally* Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1721–24 (2011) (arguing that the applications of the endorsement and free exercise balancing tests are equally vulnerable to the criticism that they involve subjective and indeterminate decisionmaking by the judiciary).

faiths while denying comparable exemptions sought by other religions.[233] Second, some accommodations simply go too far and unfairly privilege religion at the expense of third parties, nonbelievers, and the general public.[234] I agree that these are both important Establishment Clause constraints on the constitutionality of accommodations. I also suggest, however, that it is difficult to enforce either principle without engaging in the same kind of subjective, indeterminate, and value-laden balancing analysis that the Court identified as a primary reason for substantially limiting the scope of free exercise rights in *Smith II*.

Consider how a court can determine whether a legislative accommodation violates equality principles by impermissibly preferring some faiths over others. Some cases, of course, would be easy to resolve. Assume a state law allows Jewish students attending public school to be excused from the state's compulsory attendance requirements on religious holidays but denies Buddhist and Hindu students a comparable accommodation. That is an easy law to invalidate under the Establishment Clause, but it is extremely unlikely that a blatantly discriminatory law like this one would be enacted in the first place.

Now consider a more common kind of a case. The federal government for many years has exempted the Native American Church (and more recently the members of all recognized Indian tribes) from the ban on using peyote imposed by the Controlled Substances Act (CSA).[235] Reasoning by analogy from that exemption, members of other faiths argued that they should be relieved of the obligations of the CSA that prevent them from using other prohibited substances in their religious rituals. Ethiopian Zion Coptic Church members, Rastafarians, and others demanded an accommodation for the use of marijuana.[236] Members of other faiths have

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[233] *See supra* notes 148–53 and accompanying text.

[234] *See supra* notes 154–62 and accompanying text.

[235] 42 U.S.C. § 1996a(b)(1) (2006).

[236] *See, e.g.*, Olsen v. DEA, 878 F.2d 1458, 1463–64 (D.C. Cir. 1989) (acknowledging that federal court is compelled to adjudicate a claim of denominational preference based on allowing an exemption for religious use of peyote by Native American Church members while denying an exemption for religious use of marijuana by Ethiopian Zion Coptic Church members); Olsen v. Iowa, 808 F.2d 652, 653 (8th Cir. 1986) (per curiam) (confirming the conviction of a member of the Ethiopian Zion Coptic Church for possession of marijuana); United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984) (denying a religious exemption to controlled substances laws for members of the Ethiopian Zion Coptic Church); McBride v. Shawnee Cnty., 71 F. Supp. 2d 1098, 1100–01 (D. Kan. 1999) (recognizing that a state cannot treat Rastafarian religion less favorably than the Native American Church if both religions are similarly situated, but concluding that they are not).

sought[237] and may well seek exemptions for the ritual use of other restricted substances. How should a court go about evaluating these claims?[238]

There is no mystery here as to the kind of analysis courts apply to these claims. Indeed, these kinds of arguments have been raised and adjudicated on several occasions by lower courts. In most cases, courts evaluate the state's interest in denying the sought-after accommodation to determine if it is substantially different and more important than the state's interest in restricting access to peyote by Native Americans.[239] For example, an exemption for the religious use of peyote might be more easily controlled and less burdensome to law enforcement than exemptions for the religious use of marijuana.[240]

Courts consider these and other arguments to determine if the costs to society of granting an exemption for the religious use of marijuana justify the different treatment provided to the two controlled substances. If the costs are sufficiently different, the courts will distinguish the state's interest in these two situations and reject the claim for an accommodation for the religious use of marijuana.[241] Just how much of a difference between the costs of the two accommodations being compared to each other will justify treating them differently is necessarily an open and subjective inquiry.

This kind of an inquiry, however, bears an uncomfortable resemblance to the balancing analysis that the majority opinion in *Smith II* deplores. Balancing tests in free exercise cases do not weigh the value of one religious practice over another.[242] Once a court concludes that the right is burdened or abridged, the court's focus is almost always on the nature and importance of the state's interest that conflicts with the exercise of a right. It will evaluate the sufficiency and importance of the state's interest and whether alternative regulations are available that would adequately further that interest while imposing a less serious burden on the exercise of the

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[237] *See, e.g.*, Gonzalez v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 425–26 (2006) (arguing for an exemption for *hoasca* tea under RFRA).

[238] While courts sometimes construed these arguments to raise equal protection claims, they are more appropriately evaluated under the Establishment Clause. *See Olsen v. DEA*, 878 F.2d at 1468 (Buckley, J., dissenting).

[239] *See, e.g.*, *id.* at 1462–63 (majority opinion); *Rush*, 738 F.2d at 512–13; *McBride*, 71 F. Supp. 2d at 1100–02. *But see* Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342, 1349 (N.D. Tex. 1988) (finding no need to compare the state interest in prohibiting other religious groups from using peyote because the Native American Church exemption is unique).

[240] *Olsen v. DEA*, 878 F.2d at 1463 (distinguishing availability and risk of abuse of marijuana from availability and risk of abuse of peyote); *Olsen v. Iowa*, 808 F.2d at 653 (distinguishing ceremonial use of peyote in "controlled and isolated circumstances" with "Coptic Church members' continuous and public use of marijuana"); *Rush*, 738 F.2d at 513 (distinguishing the burden on law enforcement resulting from exemptions for peyote and marijuana); *McBride*, 71 F. Supp. 2d at 1101–02 (distinguishing marijuana and peyote exemptions in terms of enforcement difficulties and risk of abuse).

[241] *See* cases cited *supra* note 240.

[242] *See Smith II*, 494 U.S. 872, 887 (1990) (explaining that it is inappropriate and beyond their competence for courts to evaluate the centrality or merits of different religious claims).

right.[243] That is a pretty fair description of the analysis a court employs to determine whether the granting of one religious accommodation but not another constitutes unconstitutional preferentialism in violation of the Establishment Clause.

One might argue that the Establishment Clause inquiry is less subjective, indeterminate, and value laden than a free exercise balancing test. Reviewing the constitutionality of an accommodation on equality grounds requires a comparison between prior exemptions that were granted and current law that fails to include an accommodation in arguably similar circumstances. The application of rigorous scrutiny in a free exercise case involves an ad hoc and independent weighing of the state's interest against the value of religious freedom to the individual asserting the claim. Balancing is a more open-ended inquiry than a comparative analysis.

The difference between these two forms of review may be much more modest than this argument suggests, however. As noted, most of what a court weighs when it applies a balancing test is focused on the state's side of the scale. Moreover, American constitutional law cases depend on reasoning by analogy whether the court is comparing one religious accommodation against another or balancing the state's interest against the claimant's free exercise right. In reviewing free exercise claims for constitutionally mandated accommodations, the history of prior regulations and decisions granting or denying sought-after accommodations will form the foundation for legal argument in cases asserting new claims.[244] The analysis courts employ in an Establishment Clause case involving discretionary accommodations is substantially similar. Once a state grants or refuses to grant a discretionary accommodation to a religious group for a particular practice, courts will compare the cost or risks associated with that decision to other accommodation decisions in evaluating claims of favoritism or discriminatory treatment.[245] Whether the court is protecting

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[243] *See, e.g.*, United States v. Lee, 455 U.S. 252, 258–60 (1982) (focusing on importance of state interest and extent to which religious exemption will interfere with it); People v. Woody, 394 P.2d 813, 818–19 (Cal. 1964).

[244] *See* Bowen v. Roy, 476 U.S. 693, 701–08 (1986) (discussing prior free exercise cases and accommodation statutes in evaluating plaintiff's free exercise claim); United States v. Middleton, 690 F.2d 820, 824–25 (11th Cir. 1982) (rejecting plaintiff's argument analogizing an Amish community's religious liberty interest in controlling the education of their children, upheld in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to a Coptic community's liberty interest in the religious use of marijuana because of the "difference in the nature of the governmental interests involved in the two cases"). Indeed, it is not uncommon for courts to adjudicate claims of religious discrimination under the Free Exercise Clause rather than the Establishment Clause because the analysis is so similar in both cases. *See, e.g.*, Town v. Reno, 377 So. 2d 648, 651 (Fla. 1979).

[245] *See supra* notes 239–43. Judge Buckley's dissenting opinion in *Olsen v. DEA* provides a particularly effective illustration of how these cases should be reviewed. 878 F. 2d at 1468–72 (Buckley, J., dissenting); *see also In re* Springmoor, Inc., 498 S.E.2d 177, 181–83 (N.C. 1998) (distinguishing the tax exemption for religiously affiliated homes for the aged, sick, and infirm from the tax exemption for all houses of worship upheld in *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970)).

religious liberty in a free exercise case or enforcing religious equality under the Establishment Clause, some form of a comparative weighing of the state's interest is likely to be a significant part of its reasoning. If that analysis is unacceptably unpredictable and subjective, it is likely to be vulnerable to that criticism in both kinds of cases, not just in free exercise litigation.

An even stronger argument about the unavoidability of subjective inquiries akin to balancing in accommodation cases applies in cases in which an accommodation is challenged on the ground that it extends too far and burdens nonbeneficiaries to an unacceptable extent. Consider the words used by the Court to describe this constitutional constraint. The Court invalidates accommodations that assign an "unyielding weighting in favor of [religious accommodations] over all other interests . . . ."[246] If this language means that a discretionary accommodation of religious exercise must be susceptible to being outweighed by countervailing state interests, it would seem to require some form of balancing analysis to determine if a challenged accommodation withstands Establishment Clause review.

Alternatively, the Court questions whether an accommodation would be constitutional if it "burdens nonbeneficiaries markedly."[247] Most recently, the Court concluded that to avoid an as-applied challenge under the Establishment Clause, a general accommodation statute "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . ."[248] In addition, accommodations may not be "excessive" or "jeopardize the effective functioning of an institution . . . ."[249] Certainly, one may argue that these vague standards are as subjective and indeterminate as the application of strict scrutiny review to a neutral law of general applicability that substantially burdens the exercise of religion.

Indeed, the indeterminate nature of the Court's review of religious accommodations under the Establishment Clause can be demonstrated not only by reference to what the Court says in its opinions, but also in the diversity of its holdings. Over the last forty years, the Court struck down religious accommodations in *Texas Monthly*,[250] *Estate of Thornton*,[251] *Kiryas Joel*,[252] and *Larson*[253] on Establishment Clause grounds. It has upheld

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[246] Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985).

[247] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989).

[248] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[249] *Id.* at 726.

[250] 489 U.S. at 5 (striking a Texas law that exempted religious periodicals from sales tax).

[251] 472 U.S. at 708–11 (striking a Connecticut law that gave Sabbath observers an absolute and unqualified right to not work on their day of Sabbath).

[252] 512 U.S. 687, 703 (1994) (striking a New York law that carved out a special school district for an enclave of a religious group).

[253] 456 U.S. 228, 230, 255 (1982) (striking a Minnesota statute that imposed requirements on religious groups that solicited nonmembers for over half of their funds).

accommodations in *Gillette v. United States*,[254] *Amos*,[255] and *Cutter*.[256] Justice Stevens wasn't on the Court when *Gillette* was decided, but the overall point here extends beyond Justice Stevens's jurisprudence. It is extremely difficult to reconcile the holdings of these cases in terms of the burdens the accommodations impose on nonbeneficiaries or the degree to which they favor some faiths over others.[257]

C. The Isolation of Disfavored Minority Faiths

The foregoing discussion focused on the justifications for free exercise doctrine that rejects constitutionally mandated exemptions. It attempted to present an ongoing and continuing dialogue on challenges to this approach using the constitutional values Justice Stevens has recognized in the Free Exercise and Establishment Clause opinions he has written and joined to guide the conversation. There is no concluding resolution to this kind of a discussion. The arguments back and forth could continue well beyond the pages allocated for this symposium issue.

However, there is another argument about free exercise exemptions that has not been covered yet that merits some additional discussion. The constitutional framework addressed so far examines the costs of a regime that rejects all constitutionally mandated exemptions. But there may be uniquely problematic costs resulting from a more rigorous free exercise doctrine that requires exemptions in some cases but not others. The argument here in support of Justice Stevens's equality-based, free exercise jurisprudence has considerable persuasive power. No plausible free exercise standard of review will require accommodations in all cases. The number of

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[254] 401 U.S. 437, 454 (1971) (upholding a conscription law as neutral and secular).

[255] 483 U.S. 327, 329 (1987) (upholding a section of the Civil Rights Act that "exempt[ed] religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion").

[256] 544 U.S. 709, 720 (2005) (upholding the institutionalized-persons provision of RLUIPA).

[257] The Title VII amendments allowing religious organizations to discriminate in hiring, upheld in *Amos*, for example, may result in nonbeneficiaries suffering severe burdens. The plaintiff in *Amos* lost a job that he had held for sixteen years. 483 U.S. at 330. In *Texas Monthly*, the cost to taxpayers of granting a sales tax exemption to the publishers of religious books and periodicals may be difficult to quantify, but at worst, it imposed a very modest burden on their finances. *See* 489 U.S. 1, 14–15 (1989). Yet the accommodation in *Amos* was upheld and the exemption in *Texas Monthly* struck down. In *Larson*, the Court struck down under strict scrutiny an exemption from a registration and reporting requirement that applied only to religious charities receiving less than 50% of their contributions from members or affiliated organizations on the grounds that it favored some faiths over others. 456 U.S. at 246–255. In *Gillette*, however, the Court upheld under relatively lenient review a conscientious objector statute that exempted religious pacifists who opposed all wars (e.g., Quakers) from military conscription but provided no accommodation to pacifists religiously opposed to unjust wars (e.g., Catholics). 401 U.S. at 436–37. Given the obvious and predictable discriminatory impact of the accommodation challenged in *Gillette*, the difference in treatment afforded the two laws is difficult to explain. *See generally* MCCONNELL ET AL., *supra* note 185, 246–51 (identifying, but providing no answers to, the problems in understanding and reconciling some of these accommodation cases).

claims that will be rejected may vary with the rigor of the review applied. Whatever standard of review is employed, however, in some circumstances the state's interests will outweigh the free exercise rights of the religious claimant.

The results of such litigation may leave some minority faiths in a more painful situation than they would have been in under the regime created in *Smith II* that rejects all claims—regardless of the religious practice at issue or the insubstantiality of the state's interest. Put simply, any attempt to protect religious liberty through some kind of balancing analysis will help some minority faiths but at the cost of increasing the injury to other small religions, unconventional religions, or both. The granting of accommodations to some faiths and not others will increase the sense of isolation and ill-treatment experienced by those minority faiths denied an exemption. Whatever feelings of discrimination and disfavored status a minority faith may experience if its claim for an accommodation is rejected will be magnified substantially if other small faiths receive exemptions for their religious practices. It is bad enough to be treated less favorably than the majority. It is far worse to be singled out as one of the few minority faiths that are undeserving of accommodation.

An illustration of the burden of being singled out among minorities for disfavored treatment, although not in the context of an exemption from general laws, can be found in the Fourth Circuit's decision in *Simpson v. Chesterfield County Board of Supervisors*.[258] *Simpson* involved a County Board of Supervisors policy requiring the offering of a "non-sectarian invocation" before the Board began its legislative sessions.[259] In administering the offering of these invocations, the Board's clerk invited clergy and leaders from all of the religious congregations in the county to participate in its program.[260] Clergy who responded affirmatively to this invitation were scheduled to offer the invocation on a first-come, first-serve basis.[261]

When Cynthia Simpson, a spiritual leader of the Wicca religion, asked to be included on the list of religious leaders scheduled to offer the invocation, however, the Board refused to permit her to do so[262]—ostensibly because she was not a member of a monotheistic congregation. Simpson sued alleging a violation of both of the religion clauses of the First Amendment.[263] A Fourth Circuit panel upheld the county's policy.[264]

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[258] 404 F.3d 276 (4th Cir. 2005).
[259] *Id.* at 278.
[260] *Id.* at 279.
[261] *Id.*
[262] *Id.* at 279–80.
[263] *Id.* at 280.
[264] *Id.* at 288.

There are many things wrong with the court's opinion in the *Simpson* case. But the greatest defect is the court's inability to understand why the county's policy was constitutionally objectionable. The court noted that in *Marsh v. Chambers*, the Supreme Court rejected an Establishment Clause challenge to the state legislature of Nebraska's hiring of a Presbyterian minister to serve as legislative chaplain and to open each session of the legislature with a prayer.[265] The same Presbyterian minister had held the position for sixteen years.[266] To the Fourth Circuit panel in *Simpson*, Chesterfield County's policy was "in many ways more inclusive than that approved by the *Marsh* Court."[267] Indeed, the court explained, "[i]n contrast to *Marsh's* single Presbyterian clergyman, the County welcomes rabbis, imams, priests, pastors, and ministers. Chesterfield not only sought but achieved diversity. Its first-come, first-serve system led to prayers being given by a wide cross-section of the County's religious leaders."[268] Simpson's attempt to interpret "the County's inclusiveness as a negative" simply made no sense to the court.[269]

I am confident that Justice Stevens would have had little difficulty in understanding both the power and the merits of Simpson's claim and in rejecting the myopic understanding of Establishment Clause concerns exhibited by the Fourth Circuit panel. While the appointment of a minister from one Protestant denomination as legislative chaplain for sixteen years may be problematic, the harm caused by such religious favoritism is fairly widespread. In 2000, there were 39,000 Presbyterians in Nebraska who attended church services out of a total population of 1,000,000 church-goers.[270] It would be difficult to argue that the overwhelming majority of religious non-Protestant Nebraskans experienced the legislature's decision as directly deprecating their faith. Surely, a policy that permitted members of the clergy of any denomination to serve as legislative chaplain except Presbyterians would communicate a very different and more invidious and hurtful message. The Chesterfield County policy communicated just such a message of exclusion and unworthiness to Ms. Simpson and her co-religionists. The experience of being the only religion denied the opportunity to offer a prayer at legislative sessions—an opportunity provided to a host of other religious leaders and congregations—is distinctively alienating and oppressive. Justice Stevens's concerns about the state accommodating some religions but not others[271] reflects his

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[265] 463 U.S. 783, 792–95 (1983).

[266] *Id.* at 793.

[267] 404 F.3d at 285.

[268] *Id.*

[269] *Id.* at 286.

[270] *See State Membership Report: Nebraska, Denominational Groups, 2000*, ASS'N RELIGION DATA ARCHIVES, http://www.thearda.com/mapsReports/reports/state/31_2000.asp (last visited June 30, 2012).

[271] *See supra* Part II and notes 148–53 and accompanying text.

appreciation of the uniquely stigmatizing consequences that this kind of unequal treatment may inflict on minority faiths.

As the above discussion illustrates, allowing courts, the political branches of government, or both to grant religious accommodations not only risks decisions based on religious familiarity and favoritism, but may also substantially magnify the injury experienced by minority faiths whose claims for exemptions from neutral laws are denied. These risks and costs are real, but there is an additional and arguably offsetting value to requiring religious exemptions in appropriate cases that needs to be taken into account as well. Granting judicial or legislative accommodations to some faiths may well create risks of increased isolation for small and less well-known religions, but it also provides legal tools to minority faiths that they may use to their advantage. Once an accommodation is granted to one faith, the decision to do so becomes a wedge that other faiths may employ to pry open the door to additional exemptions.

If either a court or a legislature determines that an exemption from a neutral law for one religious practice does not unacceptably interfere with the state's interest furthered by the law, the fact of that exemption necessarily undermines the government's ability to assert that same state interest as a justification for denying exemptions for other religious practices. The Court's reasoning in *Gonzalez v. O Centro Espírita Beneficente União do Vegetal* persuasively illustrates the utility of pointing to prior exemptions in arguing against the state's justifications for denying accommodations.[272] Although *O Centro* involved a statutory claim under the RFRA rather than a free exercise claim, the statutory standard required by the federal law, strict scrutiny, was the same standard of review applied in many fundamental rights cases and pre-*Smith* free exercise cases.

At issue in *O Centro* was an RFRA claim brought by a very small religious sect, O Centro Espírita Beneficente União do Vegetal (UDV), seeking to enjoin the federal government from interfering with their use of *hoasca*, a sacramental tea, in religious rituals.[273] *Hoasca* tea contains a hallucinogen, the possession and use of which is prohibited by the CSA.[274] In defending its refusal to exempt the religious use of *hoasca* tea from the requirements of the CSA, the government argued that *hoasca* tea "has a high potential for abuse" and that individuals ingesting the drug are exposed to serious health risks.[275]

In rejecting the government's argument, the Court noted that very similar risks exist with regard to the ingestion of mescaline, an ingredient in

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[272] 546 U.S. 418, 433–36 (2006).

[273] *Id.* at 425–26.

[274] *Id.* at 425 (explaining that *hoasca* tea contains dimethyltryptamine, which is listed in Schedule I(c) of the Controlled Substances Act, 21 U.S.C. § 812(c) (2006)).

[275] *Id.* at 433 (internal quotation marks omitted).

peyote.[276] Yet the federal government granted an exemption for the religious use of peyote to Native Americans.[277] Thus, the Court wondered:

> [i]f such use is permitted . . . for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.[278]

Similarly, when the government argued "that the effectiveness of the Controlled Substances Act will be 'necessarily . . . undercut' if the Act is not uniformly applied," the Court was not persuaded.[279] "The peyote exception," it pointed out, "has been in place since the outset of the Controlled Substances Act, and there is no evidence that it has 'undercut' the Government's ability to enforce the ban on peyote use by non-Indians."[280]

The Court's analysis in *O Centro* is neither surprising nor unconventional. Existing religious accommodations are an intrinsic part of the framework of law and fact through which the denial of other claims for accommodation will be vetted.[281] Few arguments could be more effective in challenging the denial of a requested accommodation than a reference to other accommodations granted by the state to which a meaningful analogy can be drawn.

A related, but less precise, example may also help to illustrate the costs and benefits of a policy providing accommodations to religious groups. In *Board of Education v. Mergens*, the Court interpreted the federal Equal Access Act and upheld its application against an Establishment Clause challenge.[282] The goal of the Equal Access Act was to prevent public secondary schools from denying student religious groups access to school property for religious meetings.[283] To accomplish this objective, the Act provided that public secondary schools receiving federal financial support which permit "one or more noncurriculum related students groups to meet on school premises" may not deny equal access to other student groups because of the religious, political, or philosophical content of the student groups' programs.[284] The Court interpreted the Act broadly to apply to any school that permitted student groups not directly related to the school's curriculum, such as the chess club, to hold meetings on school property.[285]

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[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.* at 434–35 (alteration in original).
[280] *Id.*
[281] *See supra* notes 236–44 and accompanying text.
[282] 496 U.S. 226, 233–34 (1990).
[283] *See id.* at 235.
[284] 20 U.S.C. § 4071(b) (2006).
[285] *See Mergens*, 496 U.S. at 240.

Because the student religious clubs at issue were not created, sponsored, or controlled by the school, permitting them to meet on school property did not violate the Establishment Clause.[286]

Justice Stevens dissented, challenging the majority's interpretation of the Act. Justice Stevens argued that the purpose of the law was to prohibit schools which permitted student groups advocating "partisan theological, political, or ethical views" to meet on school premises from discriminating among the advocacy clubs seeking access on the basis of the content of their views.[287] Such a law would conform to the Court's forum analysis and would not raise serious Establishment Clause issues.[288] Under the Court's construction of the Act, however, the Equal Access Act would require public schools to allow student religious clubs to hold meetings on school property even when the school's policy had been to deny access to controversial, partisan advocacy groups. This interpretation of the law provided religious clubs a special accommodation that raised serious Establishment Clause questions about the secular purpose of the law and whether its effect impermissibly advanced religion—although these concerns probably did not require the invalidation of the Act.[289]

Justice Stevens focused on the negative burdens imposed by the Act on schools that had no intention of creating forums for student advocacy groups on school property. In order to limit access to religious advocacy groups, he suggested, schools would have to close their doors to "familiar and innocuous activities" such as the chess club or a cheerleader squad.[290] Thus, the Act, under the majority's analysis, "comes perilously close to an outright command to allow organized prayer, and perhaps . . . religious ceremonies . . . on school premises."[291]

While the goal of the Equal Access Act may have focused on providing religious clubs greater opportunities to meet on school premises, the implementation of the Act over time had far broader consequences. Student gay–straight alliance clubs have used the statutory prohibition against discrimination to support their claim to access to school premises.[292] At least one commentator has suggested that gay–straight alliances in public high schools have been the biggest "beneficiary of the Equal Access

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[286] *See id.* at 251–53.

[287] *Id.* at 276.

[288] *See id.* at 276–80.

[289] *See id.* at 288.

[290] *Id.* at 286–87.

[291] *Id.* at 287.

[292] *See, e.g.*, Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273, 309–11 (2003); Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 192–96 (2004).

Act . . . ."[293] Student atheist clubs have also used the Act to seek access to school premises.[294] Thus, an accommodation adopted to provide access for religious groups led unexpectedly to equal access for many other organizations that were not the intended beneficiaries of the statute. Just as an accommodation of one religion may open the door for accommodations for other faiths, the accommodation of religion generally may open the door for accommodations for nonreligious individuals or groups as well.[295]

These examples do not dispute the concern that the granting of specific accommodations by either the courts or the legislatures risks the increased isolation and alienation of particular faiths. That possibility cannot be lightly dismissed. It is also true, however, that the granting of accommodations to more familiar and accepted minority faiths may provide the best, and perhaps the only, foundation for other religious minorities to persuasively argue their own religious liberty claim. Even a generic accommodation for religion may help nonreligious groups to obtain opportunities or exemptions that would otherwise be unavailable to them. Of course, weighing the risk of increased isolation against the opportunity for increased accommodation over time is not a calculation that can be performed with any degree of accuracy. But that is the point here. Judicial and legislative accommodations of religious groups create both risks and opportunities for other faiths. That uncertainty suggests that it is hard to generalize about the costs and benefits for religious equality of a regime that is open to the granting of religious accommodations. The argument that the granting of some accommodations increases inequality and stigma rather than reducing it invites further discussion as the constitutional dialogue continues.

CONCLUSION

Justice Stevens was a formidable presence on the United States Supreme Court for over three decades. His views on the religion clauses of the First Amendment represent a significant part of his constitutional law jurisprudence. During his tenure, Justice Stevens had few peers on the Court that could match his commitment to the rigorous enforcement of Establishment Clause guarantees. Justice Stevens was also well known for arguing that the Free Exercise Clause did not protect religious individuals or institutions against neutral laws of general applicability—a position that eventually commanded the support of a majority of the court.

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[293] Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 937 (2009).

[294] *E.g.*, Michael Winerip, *Teenagers Speak Up for Lack of Faith*, N.Y. TIMES, Apr. 4, 2011, at A12.

[295] *See e.g.*, United States v. Seeger, 380 U.S. 163, 166 (1965) (holding that conscientious objector status must be available to an individual whose sincere pacifist beliefs occupies the same place in his life that the belief in God occupies for an individual who qualifies for the exemption).

The ostensible dissonance between Justice Stevens's expansive interpretation of the Establishment Clause and his much more limited interpretation of the Free Exercise Clause rests on a unifying foundation—Justice Stevens's concerns about religious equality. To Justice Stevens, the Establishment Clause requirement that laws must further a secular purpose served as a check on state action that impermissibly favored majoritarian religious beliefs. In a similar vein, Justice Stevens insisted that state-sponsored public prayer and religious displays violated the Establishment Clause because they offended religious minorities and nonbelievers and undermined their status in the community.

Justice Stevens's reluctance to permit free exercise challenges against neutral laws of general applicability was also grounded in concerns about religious equality. If the federal courts adjudicated free exercise claims, they would end up, inevitably, protecting the practices of certain faiths but not others. Balancing state interests against free exercise was an intrinsically subjective and value-laden process that exceeded both the competence and the legitimate role of federal judges. To Justice Stevens, the inequality of results intrinsic to such an adjudicatory mechanism was constitutionally unacceptable.

What we can learn about Justice Stevens's interpretation of the religion clauses, gleaned from the many opinions he authored or joined, raises as many questions as it answers, however. One may argue, for example, with considerable persuasive force, that many neutral laws of general applicability are drafted to avoid conflicts with the practices of large and politically powerful faiths. Accordingly, denying religious accommodations to minority faiths burdened by such laws will result in the very same inequality of treatment between majority and minority faiths that Justice Stevens so frequently and eloquently condemned in his Establishment Clause opinions. Indeed, the alienation and marginalization experienced by religious minorities whose ability to practice their faith is burdened by general laws may be as severe as any affront they experience from public prayers or religious displays that favor other religions.

Alternative reasons for denying all free exercise claims against neutral laws of general applicability are subject to serious challenges as well. The subjectivity inherent in free exercise balancing may be no more subjective and unpredictable than the task of determining when state-sponsored prayers and religious displays impermissibly endorse religion—a judicial function that Justice Stevens repeatedly supported. Indeed, it is not even clear that assigning the problem of granting or denying religious accommodations to the political branches of government frees the judiciary from value-laden and indeterminate inquiries into accommodation disputes. Justice Stevens insisted that the Establishment Clause required federal judicial evaluation of discretionary accommodations to determine if such exemptions favored some faiths over others and whether they imposed unfair and excessive burdens on nonbeneficiaries. These tasks, however,

involve the same kind of subjective and open-ended analysis that the Court, with Justice Stevens's assent, condemned in free exercise cases.

Ultimately, these and other questions remain unanswered and are open to ongoing analysis and debate. The final chapters of Justice Stevens's jurisprudence were not completed when he retired from the Court. They are still being written in scholarly discussions in this symposium and other sources. The discussion of the jurisprudence of great Supreme Court Justices continues far beyond their tenure on the Court.